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JUS398

# **Prostitution and the free will – a critical view on consent in prostitution**

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## Foreword

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Berlin, 01.06.2011.

*For Auntie Gerda, because you did not get the chance.*

## List of abbreviations

BGB – German Civil Code, Bürgerliches Gesetzbuch

BMFSFJ – Bundesministerium für Familie, Senioren, Frauen und Jugend, German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth

CEDAW – Convention on Elimination of all forms of Discrimination Against Women

DEDAW – Declaration on Elimination of all Discrimination Against Women

Et. seq. – the following.

FRG – Federal Republic of Germany

GDR – German Democratic Republic

Ibid – the cited publication, on the same page

ICJ – International Court of Justice

Op. cit. – the cited publication, on another page.

Ot.prp. – Odelstingsproposisjon, Proposition to the Odelsting, Norwegian preparatory work

SALRC – South African Law Reform Commission

SoFFI – Sozialwissenschaftliches FrauenForschungsInstitut an der Evangelischen Fachhochschule Freiburg, a social science research institute

StGB – the German Criminal Code

SWEAT – Sex Workers Education and Advocacy Taskforce

UN – United Nations

ZAR – South African Rand

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# 1. Introduction

## 1.1 Presentation of the topic

Prostitution is a highly debated field of law internationally. Most countries agree that forced prostitution is a crime, and international law reflects this. But when it comes to voluntary prostitution there is a wide variety of regulations on national level. This is not regulated to the same extent in international law.

Take the case of a prostitute selling sexual services. International law stipulates that, if the prostitute has been a victim of trafficking, this is a crime against the prostitute and a violation of the prostitute's human rights.<sup>1</sup> If the prostitute is forced, and if this takes place in an armed conflict of internal or international character, it constitutes a war crime.<sup>2</sup> Also, if the prostitute is forced or is a victim of trafficking, and if this takes place as part of a widespread systematic attack against a civil population, it is a crime against humanity.<sup>3</sup> The number of member states adhering to the treaties regulating these questions shows that the international society to a large extent agrees on these rules.<sup>4</sup>

International law does not regulate voluntary prostitution. There is no consensus on what "voluntary" is in regard to prostitution. It is unclear whether it includes only force or also where a person is pressured into prostitution due to poverty and lack of other options.<sup>5</sup> In some countries, such as South Africa, selling sexual services is a criminal offence; in other countries, such as Germany, it is a normal occupation and the

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<sup>1</sup> Article 5(1) with reference to article 3 of the Palermo Protocol, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Adopted on 15.11.2000, came into force on 25.12.2003.

<sup>2</sup> Article 8(2)b)(xxii) regarding international armed conflict, and article 8(2)e)(vi) regarding armed conflict not of an international character, of Statute of the International Criminal Court, the Rome Statute. Adopted on 17.07.1998, came into force on 01.07.2002

<sup>3</sup> The Rome Statute, article 7(1)g) regarding forced prostitution, and article 7(1)c) regarding "enslavement" seen in light of article 7(2)c), which includes trafficking in the definition of enslavement.

<sup>4</sup> Member states to Palermo: 146, as of 31.05.2011, cf.

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en)  
Member states to the Rome Statute: 114 as of 12.10.2010, <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Both pr 31.05.2011.

<sup>5</sup> See General Recommendation number 19, section 15, from the CEDAW Committee. For more on the Committee see chapter 1.5.1 and 3.1.

prostitutes must pay tax; other countries, such as Norway, again regard this neither as a crime nor an occupation.

It is interesting that, in a very similar situation, one can reach two fundamentally different conclusions. In the first situation, one can conclude that it is a crime against humanity, one of the worst actions a human being can commit against another human being.<sup>6</sup> And in the second case it is not a crime at all. It is a normal profession that is to be respected and one has to pay tax to the society, representing the same humanity. The difference between these situations is the presence, or lack of, consent.

The reasons for entering prostitution are probably as many as there are prostitutes. Prostitution researchers agree to a great extent that prostitutes mostly come from vulnerable groups in the society.<sup>7</sup> The voluntariness behind their choices is debateable.<sup>8</sup> The distinction made between voluntary and non-voluntary prostitution is hence problematic. Even though the circumstances are different, the situations are relatively similar. It is the same act that is undertaken: the sale of a sexual service. And the conditions under which this sale occurs, is to a great extent the same, because they operate on the same market.<sup>9</sup>

The presence or lack of consent is the element that determines on which side of the distinction the prostitution is placed, whether it is a crime against humanity, or an occupation. In some circumstances it is objectively presumed that it was without consent, such as in the case of war crimes and crimes against humanity. In other circumstances, such as with trafficking, a possible consent will not be legally relevant,<sup>10</sup> but, in other circumstances, such as where prostitution is regarded as a profession, there are not even legal rules for the consent.

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<sup>6</sup> The Rome Statute, article 5(1), the crimes under the Courts jurisdiction are “the most serious crimes of concern to the international community as a whole”.

<sup>7</sup> See for example Chandré Gould in collaboration with Nicólé Fick (SWEAT), *Selling sex in Cape Town – Sex Work and Human Trafficking in a South African City* Pretoria/Tshwane 2008, p 115, and Melissa Farley *Prostitution, Trafficking and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, Yale Journal of Law and Feminism 2006, pp 109-144, on p 110.

<sup>8</sup> See for example Farley on p 110-111 and 118.

<sup>9</sup> *Op. cit.* p 121.

<sup>10</sup> See the Palermo Protocol, article 3b): “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”.

Ensuring consent is important in this area of the law. Prostitution is a dangerous activity. It is documented that prostitution is particularly violent, more violent than other dangerous occupations. This high rate of violence is present both under legal and illegal prostitution. The death rate of prostitutes is forty times higher than that of the rest of the population.<sup>11</sup> It is also documented that prostitutes suffer psychological harm, similar to that of trauma and torture survivors. An example of this is posttraumatic stress disorder, a disorder caused by psychological dissociation from their bodies.<sup>12</sup> Farley even argues that acts of prostitution and trafficking can meet and exceed the legal definitions of torture, where consent would not be given legal effect.<sup>13</sup> The background that prostitution is highly dangerous shows that there is a need for a legal regulation of consent.

The lack of legal regulation of consent to the sale of sexual services creates a discrepancy in the regulation of prostitution. Consent in general is regulated and limited in international and national law. There are boundaries and limitations for the personal autonomy when it comes to medical experiments and bodily harm.<sup>14</sup> These principles have, until now, not been applied to the question of sale of sexual services.

## 1.2 Presentation of the research question

The purpose of this thesis is to compare how consent in relation to the sale of sexual services is regulated in The Convention on Elimination on all forms of Discrimination Against Women, CEDAW, article 6 and in the national regulations of prostitution in South Africa, Germany and Norway respectively.<sup>15</sup> The question posed is

*What are the legal effects of consent to the sale of sexual services in CEDAW article 6 and the national regulations of prostitution in South Africa, Germany and Norway?*

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<sup>11</sup> Farley p 112, and 114-115.

<sup>12</sup> More about this *op. cit.* p 116.

<sup>13</sup> *Op. cit.* p 122.

<sup>14</sup> See chapters 4.3.6, 4.3.7, 5.3.5 and 6.3.4.

<sup>15</sup> CEDAW – The Convention on Elimination on all forms of Discrimination Against Women, adopted on 18.12.1979, came into force on 03.09.1981.

With 'legal effect' is meant the legal consequence of that consent is present or not.<sup>16</sup> 'Consent' describes the act of agreeing to or giving permission for something.

I will look at the coherence between the law on forced prostitution and trafficking, the law on crimes against humanity and war crimes, and the law on voluntary prostitution. I will also look at how the countries have regulated consent to bodily harm in general. I will use this information to make some recommendations for regulating consent to voluntary prostitution.

The first part is a classical legal comparison, where I will be comparing the legal regulation of prostitution in CEDAW article 6, and the national regulations on prostitution in the three countries. I will be looking both at voluntary and non-voluntary prostitution. This part will be from a *de lege lata*<sup>17</sup> perspective, presenting the law as in force today. The second part is from a *de lege ferenda*<sup>18</sup> perspective, containing recommendations on how the law should be.

### 1.3 Definitions

The legal regulation of prostitution operates with many categories. A prostitute is a person over the age of 18 who is selling sexual services.<sup>19</sup> Child prostitution is where a person below the age of 18 is selling sexual services.<sup>20</sup> A pimp is a person who is arranging or promoting someone else's prostitution.<sup>21</sup> A brothel is a place in which the

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<sup>16</sup> In German named 'Rechtswirkung', and in Norwegian named 'rettsvirkning'.

<sup>17</sup> Jonathan Law and Elizabeth A. Martin (eds.), *Oxford Dictionary of Law*, Oxford 2009, p 162, "[Latin: of (or concerning) the law that is in force] A phrase used to indicate that a proposition relates to the law as it is".

<sup>18</sup> *Ibid.* "[Latin: of (or concerning) the law that is to come into force] A phrase used to indicate that a proposition relates to what the law ought to be, or may in the future be".

<sup>19</sup> This follows from the distinction made between adult and child prostitution. See the references under child prostitution.

<sup>20</sup> See the Palermo Protocol, article 3(d), the South African Sexual Offences Act section 11 (full name Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act No 32 of 2007, adopted on 13.12.2007, came into force on 16.12.2007), the German Criminal Code section 180a(2) number 1 and section 182(2) (German name Strafgesetzbuch (StGB), of 15.05.1871. Full citation "Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 1 des Gesetzes vom 28. April 2011 (BGBl. I S. 676) geändert worden ist". English translation: "Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214"), and the Norwegian Criminal Code section 203 (Norwegian name Straffeloven, adopted on 22.05.1902, came into force on 01.01.1905).

<sup>21</sup> See the South African Sexual Offences Act section 20(1)c), the German Criminal Code section 181a, and the Norwegian Criminal Code section 202.

sale of sexual services occurs. It is not a criterion that this place is run by a pimp for it to be regarded as a brothel, the important point is that this is the place in which the sexual act takes place.<sup>22</sup> A client is a person who buys sexual services from a prostitute.<sup>23</sup>

All of the above definitions are gender neutral.<sup>24</sup> All definitions, apart from prostitution and child prostitution, are regardless of the person's age. Where a minor is buying sexual services, the minor will be regarded as a client regardless of his or her age.<sup>25</sup>

Forced prostitution is used to describe where violence, threats of other direct force has been used as means to get someone to prostitute themselves. Voluntary prostitution is defined as prostitution where the prostitute was not trafficked or directly forced in another way to enter prostitution. Trafficking is when a person is involved in the transport of a person for the purpose of prostitution, cf. the Palermo Protocol.<sup>26</sup> It is not necessary that the person trafficked crosses a country border. The important thing is that the trafficked person is transported away from his or her known geographical home. In this transport local, regional or national borders will be crossed. When in the following crossing a border in relation to trafficking is used, these kinds of borders are meant.<sup>27</sup> For such transport to be regarded as trafficking, it must be done against the victims will. The situations in which consent is presumed to not have been given are specified in a list. Even if consent is present in such cases, this is not relevant; the action is regarded as objectively without consent.<sup>28</sup>

#### 1.4 Philosophical foundations for the regulation of prostitution in general

The philosophical foundations for the regulation of prostitution can roughly be divided into a moral and a pragmatic tradition.<sup>29</sup> This is only roughly, because the two ideas

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<sup>22</sup> See the South African Sexual Offences Act, section 2 cf. 1, the German Criminal Code section 180a, and the Norwegian Criminal Code, section 202.

<sup>23</sup> See the South African Sexual Offences Act, section 11, the Norwegian Criminal Code section 202a.

<sup>24</sup> The national law in all three countries is gender neutral. CEDAW only applies to women. The Palermo Protocol applies to both, but with a special focus on women and children.

<sup>25</sup> See the Norwegian Criminal Code section 46, the South African Sexual Offences Act section 11.

<sup>26</sup> The Palermo Protocol article 3 (a): "the recruitment, transportation, transfer, harbouring or receipt of persons".

<sup>27</sup> Also other scholars uses this or similar expressions when referring to the border element of trafficking. For example Kristin Bergtora Sandvik *Handel med kvinner som menneskerettighetsbrudd*, Institutt for offentlig retts skriftserie, Oslo 2003, p 57.

<sup>28</sup> The Palermo Protocol, article 3(b).

<sup>29</sup> Author's own categorisation.

overlap; one can even see them overlapping within one country. Further, it is not to be understood that the pragmatists are promoting prostitution. None of the philosophical foundations promotes prostitution as positive and necessary in a society. Both the moral and the pragmatic traditions see prostitution as something negative, although to a different degree. The difference between the philosophical foundations is more a question of how to solve the challenge of prostitution in everyday regulation than a question of what the long-term goal is.

The moral foundation regards prostitution as immoral and aims to eradicate it. A typical moral regulation is the South African criminalisation of prostitution, or the Norwegian criminalisation of the prostitutes' clients. The pragmatic foundation sees prostitution as something that cannot be ended, and rather aims to regulate it. This is done by regulating the negative sides of prostitution so that it is as positive as possible for the persons involved. The traditions differ in their view of who the victim of prostitution is. Under the moral tradition, there is a tendency to view society at large as the victim, more than the prostitute. This can be seen in that the sections regulating prostitution are under public prosecution and the prostitute is not given the status of a victim. In the pragmatic tradition, the prostitute is more in focus. This can be seen in that the regulation gives the prostitutes more rights, and that they are granted the status of victims in some instances.

Both traditions have a lack of realism, in that they to some extent regulate without taking the reality of prostitution into account. The moralist tradition regulates in the hope of eradicating prostitution, and has little focus on the situation before prostitution is eradicated. Their good intentions do not in many respects reach the persons they are trying to help – the prostitutes – in that they do not regulate with the aim of improving the situation the prostitutes are in. This can be seen in the fact that the prostitutes are given few or no rights, because this would go against the overlying purpose of eradicating prostitution.

The pragmatic tradition lacks realism in that it tries to regulate prostitution as if the persons involved were equal and were there voluntarily. The pragmatic regulation often lacks the dimension of power, meaning that it does not take into account the fact that the prostitutes are in a different situation than the buyers and the pimps. The prostitutes

are often desperate, and therefore have a weaker position for negotiating than the pimps and the clients. Similar to the moralist tradition, many of the rights granted to the prostitutes do not reach them, in this case because the rights are dependent on formalities like a work contract.

## 1.5 Legal method

### 1.5.1 Relevance – choice of sources

To answer the research question I will be using the relevant legal instruments regulating prostitution internationally and nationally. Relevance means the sources that provide a representative overview of the regulation of prostitution and consent to the sale of sexual services.

The general international legal method for the definition of the relevant sources of international law is partly codified in the Vienna Convention on the Law of Treaties from 1969,<sup>30</sup> and in the Statutes of the International Court of Justice from 1945.<sup>31</sup> The International Court of Justice, the ICJ, is the “principal judicial organ of the [UN]”.<sup>32</sup> Article 38 of the Statutes of the ICJ is recognized as codifying the relevant sources in international law. Among them is article 38(1) a) relating to “international conventions ... expressly recognized by the contesting states”. This means treaties that the states have ratified. In the context of this thesis, these are CEDAW, the Convention on Elimination of all Discrimination Against Women, and the Palermo Protocol regarding trafficking. These are more relevant than other treaties on the topic, because they have been signed by the largest number of member states and therefore have the biggest impact on international law. CEDAW focuses on both voluntary and non-voluntary prostitution, whilst the Palermo Protocol only regulates trafficking.

The UN General Assembly adopted CEDAW on 18 December 1979, and it came into force on 3 September 1981. The CEDAW Committee was established to monitor the implementation of the Convention.<sup>33</sup> The Committee was established in 1982 and consists of 23 women’s rights experts from around the world. The Committee has the

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<sup>30</sup> Adopted 23.05.1969, came into force on 27.01.1980.

<sup>31</sup> Adopted 26.06.1945, came into force on 24.10.1945.

<sup>32</sup> Cf. the UN Charter article 92, adopted on 26.06.1945, came into force on 24.10.1945.

<sup>33</sup> CEDAW article 17.

competence to make General Recommendations,<sup>34</sup> which they have done on a number of topics. These include General Recommendations number 12 and 19, on violence against women.<sup>35</sup> Recommendation 19 entails recommendations regarding the implementation of article 6 and prostitution in general.<sup>36</sup> The General Recommendations are, as the name implies, only recommendations. But even though they are not legally binding, they still have weight as legal sources for the interpretation of the articles in the CEDAW. The state parties are under the obligation to deliver state reports.<sup>37</sup> The Committee discusses these reports, and then publishes its Concluding Observations on the reports. The state reports and their concluding observations, and the general recommendations are therefore relevant sources for interpreting article 6.

The Palermo Protocol is a protocol to the UN Convention against Transnational Organized Crime, the Palermo Convention, adopted in Palermo, Italy, in December 2000.<sup>38</sup> The Palermo Protocol is the latest instrument regulating prostitution internationally. The relevant part of the Palermo Protocol is the definition of trafficking in article 3. The Palermo Convention does not have a supervising committee of the same kind as CEDAW.<sup>39</sup>

Furthermore “international custom, as evidence of a general practice accepted as law” is a relevant source, cf. article 38(1)b) of the Statute of the ICJ. Article 38(1)c) states that “the general principles of law recognized by civilized nations” are relevant legal sources. These principles are known as *jus cogens*.<sup>40</sup> The prohibition of torture is an example of a *jus cogens* norm, and forced prostitution is regarded as torture.

In letter d) the “judicial decisions and teachings of the most highly qualified publicists of the various nations” are listed as relevant subsidiary sources. They are subsidiary to the sources listed in letter a) to c). Letter d) is the legal foundation for the use of judicial decisions and legal literature as a source. Judicial decisions are only directly binding

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<sup>34</sup> CEDAW article 21.

<sup>35</sup> General Recommendation 12 was adopted in 1989, 19 was adopted in 1992.

<sup>36</sup> General Recommendation 19, paragraphs 13-16.

<sup>37</sup> CEDAW article 18.

<sup>38</sup> See note 1.

<sup>39</sup> Disputes concerning the interpretation of the Convention are to be solved by arbitration, and if that fails, the dispute is to be brought before the International Court of Justice, cf. article 35 (1) and (2).

<sup>40</sup> *Oxford Dictionary of Law* “[Latin: coercive law] A rule or a principle in international law that is so fundamental that it binds all states and does not allow any exceptions”.



between the parties to the case, but against the background of letter d) one can use case law as a source for relevant legal arguments in another case. Based on this, international case law such as *Foča* and *Laskey, Jaggard and Brown*, will be relevant sources on the international limitations of consent to sexual acts.<sup>41</sup>

I have chosen to compare three countries (South Africa, Germany and Norway) with regard to their regulation of the consent to the sale of sexual services, and the implementation in the respective national systems of the rights granted in CEDAW article 6.

I have chosen to compare how three countries regulate the consent to the sale of sexual services. This will be shown by how the right granted in CEDAW article 6 is implemented in the national regulation in South Africa, Germany and Norway. The countries have been chosen because they are all member states to both CEDAW and Palermo, and because they have a fundamentally different national regulation. The most relevant sources on the national level are the legal acts, supplemented with relevant case law. In South Africa, the Sexual Offences Act with amendments is the relevant source.<sup>42</sup> In Germany it is the Prostitution Act,<sup>43</sup> and in Norway it is a chapter in the Criminal Code.<sup>44</sup> All three countries also have some relevant case law that will be used.<sup>45</sup>

I will also look at the legal effects of consent to other forms of bodily harm, from all three countries as well as internationally. I will be doing this in order to examine the legal effect of consent to bodily harm in general and thus to shed light on the system of consent as a whole. The relevant sources for this are the national criminal and medical law in the respective country.<sup>46</sup>

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<sup>41</sup> *Foča Trial Chamber*: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber 22.02.2001, Case No. IT-96-23-T & IT-96-23/1-T. *Laskey, Jaggard and Brown v. The United Kingdom*, European Court of Human Rights, 19.02.1997, (21627/93; 21826/93; 21974/93).

<sup>42</sup> Full name is Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act No 32, 2007.

<sup>43</sup> German name is Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten (Prostitutionsgesetz – ProstG). Adopted 20.12.2001, came into force 01.01.2002.

<sup>44</sup> Chapter 19 of the Criminal Code.

<sup>45</sup> For South Africa see the *Jordan* case, Constitutional Court of South Africa, S v Jordan and Others, 09.10.2002, /CCT31/01)[2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117; for Germany see Bundesverwaltungsgericht 1965, 22 p 286, 289; for Norway see the *Skippagurra* case, Rt. 2004.331.

<sup>46</sup> For South Africa, see the National Health Act, Act No 61 of 2003; for Germany, see the Criminal Code, German name Strafgesetzbuch; for Norway, see the Criminal Code of 1902, Norwegian name Straffeloven, and the Transplantation Act of 1973, Norwegian name Transplantasjonsloven.

### 1.5.2 International method for interpretation

The sources will be interpreted according to their own accepted standards for legal interpretation. These methods are different for all three countries as well as on the international level. The method used to interpret an international treaty is based partly on general international principles, supplemented with special principles for that particular treaty. One general feature is that treaties are not part of a coherent system. The terms used in international conventions are to be interpreted autonomously, but shall be understood to have the same content throughout the whole treaty. The context is reduced to the context of the treaty itself. Therefore, one method will be used for CEDAW and another slightly different method for interpreting the Palermo Protocol.

Articles 31 to 33 of the Vienna Convention set out the rules for interpretation. The main rule is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, cf. article 31(1). In article 31(2) is listed what is to be understood as the context of the treaty, and what it includes. This comprises firstly the complete text of the treaty, including a possible preamble and annex. Both CEDAW and the Palermo Protocol have a preamble that will be used for the interpretation of the relevant articles. The preamble to CEDAW focuses on respecting the dignity and worth of the human person,<sup>47</sup> and on combating discrimination and inequality between the sexes.<sup>48</sup> Promoting human dignity and combating gender-discrimination are important guidelines for the interpretation of CEDAW.

Because the Palermo Protocol is a supplement to the UN Convention against Transnational Organized Crime, the means of interpretation differs somewhat from the normal international legal method. According to article 1(1), the Protocol is to be interpreted “together with the Convention”. Furthermore, the “provisions of the Convention ... [shall] apply mutatis mutandis to this Protocol unless otherwise stated herein”, cf. article 1(2). This means that, by interpretation of the Protocol, the context includes the whole Convention, and the definitions in the Convention are intended to

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<sup>47</sup> CEDAW, preamble, paragraphs one and seven.

<sup>48</sup> CEDAW, preamble, paragraphs two, three, four, five, six, seven, nine and fifteen.

apply also to the Protocol, cf. the Vienna Convention article 31(2)b).

The preamble to the Palermo Convention refers to the need to combat organised crime more effectively, and this is also reflected in the statement of purpose in article 1.<sup>49</sup> This means that the articles in the Convention and the Protocol must be interpreted in a way that makes them effective in combating the organised crime trafficking constitutes. The preamble to the Palermo Protocol refers to the human rights of the trafficking victims, and the lack of sufficient protection for the persons who are vulnerable to trafficking.<sup>50</sup> The Palermo Protocol must therefore be interpreted in a way that makes it an effective instrument to combat organised crime, and to protect and promote the human rights of victims of trafficking.

The context of a treaty consist furthermore of “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”, cf. article 31(2)a) of the Vienna Convention, and “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”, cf. article 31(2)b). The Optional Protocol to CEDAW from 1999 can be regarded as such a subsequent agreement.<sup>51</sup> With the Optional Protocol, the Committee was given the competence to hear individual communications<sup>52</sup> and to conduct investigations under an inquiry procedure.<sup>53</sup> The communications in relation to these procedures are therefore relevant sources for interpreting article 6 of CEDAW. In the past, one communication dealt with forced prostitution.<sup>54</sup>

In addition to the context, various subsequent factors are to be considered. These include any “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”, cf. article 31(3)a) of the Vienna Convention, and any “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”, cf. article 31(3)b).

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<sup>49</sup> The Palermo Convention, preamble, paragraph seven and article 1.

<sup>50</sup> The Palermo Protocol, preamble, paragraphs one and three.

<sup>51</sup> Adopted by the General Assembly 6 October 1999, (A/RES/54/4), came into force 22.12.2000.

<sup>52</sup> Article 2 in the Optional Protocol.

<sup>53</sup> Article 8 in the Optional Protocol.

<sup>54</sup> The Case between Ms Zhen Zhen Zheng and the Netherlands, decided in Committee Meeting 27.10.2008, case reference CEDAW/C/42/D/15/2007.

Furthermore “any relevant rules of international law applicable in the relations between the parties” is to be taken into account, cf. article 31(3)c).

In international law, the parties’ will or the parties’ intentions are central factors in the interpretation. This is based on the principle of sovereignty, which entails that the states are only bound by what they have agreed to.<sup>55</sup> The importance of the parties’ will can, for example, be seen in article 31(4) of the Vienna Convention which states that “a special meaning shall be given to a term if it is established that the parties so intended”. Based on this provision, one can therefore deviate from the ordinary meaning of a term in the interpretation of a treaty.

In article 32 of the Vienna Convention, the supplementary means of interpretation are listed. These are to be used to “confirm the meaning resulting from the application of article 31”, or to “determine the meaning” in situations where the result of interpretation according to article 31 “leaves the meaning ambiguous or obscure” cf. letter a) or “leads to a result which is manifestly absurd or unreasonable” cf. letter b). These means are therefore only to be used when the interpretation under the major means of interpretation leaves an unsatisfactory result.

The supplementary means of interpretation include “the preparatory work of the treaty”, and the “circumstances of its conclusion”, cf. article 32. This refers to the preparatory work on the treaties and the protocols for the meetings that adopted the treaties. Both CEDAW and the Palermo Protocol have such documents, and these will be used for the interpretation of the treaties. However, these sources are only subsidiary sources of interpretation.

### 1.5.3 National methods for interpretation

The national legal methods also differ from one another. South Africa is a hybrid legal system, with elements of common and civil law, as well as tribal law.<sup>56</sup> The tradition for making acts stems from the civil law tradition, and the acts are detailed, with definitions

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<sup>55</sup> See the UN General Assembly Resolution 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted on 24.10.1970.

<sup>56</sup> Reinhardt Zimmermann and Daniel Visser, *Southern Cross Civil and Common law in South Africa*, Oxford 1996, p 2 et seq.

and purposes stated in the acts. The level of detail in the acts is typical for the common law tradition. The preparatory work has little value as a source. Because South Africa has a common law tradition, case law is an important and relevant source. As buying and selling of sexual services is criminalised, the principle of the rule of law applies, which means that the wording has major importance. The national regulation is provided for in the Sexual Offences Act, and the context is therefore made up of the act and its amendments. One important feature of interpreting South African acts is that they are to be interpreted in light of the Constitution and its Bill of Rights. This is set out in the Constitution and reaffirmed in the preamble to the Sexual Offences Act.<sup>57</sup> The interpretation is to be laid out in a manner which respects and promotes the rights enshrined there. The most important principle underlying the Constitution is human dignity. The Sexual Offences Act therefore has to be interpreted in a way that promotes human dignity.

Germany has a civil law tradition, with focus on acts as the major source of law. They have a formal legal method focusing on a strict interpretation of the terms in the acts.<sup>58</sup> Case law not as important as in South Africa, but it is still a relevant source; it just has a lower level of importance. In Germany, neither the act of selling, nor of buying sexual services is a crime, and those acts are therefore not regulated by criminal law provisions. It is regulated in civil law, and is to be interpreted after the respective method principles for civil law.<sup>59</sup> However, the practical difference between civil and criminal law method is limited, because the German legal method in general is highly focused on the wording.<sup>60</sup> The preparatory work has little legal value in the interpretation. The German legal method for interpretation focuses on the natural meaning of the words in their context.<sup>61</sup> The regulation of selling and buying sexual services is regulated in a single act, the Prostitution Act.<sup>62</sup> The sections in this act are to be interpreted within the context of the act. Other surrounding activities, such as the exploitation of prostitutes, are criminalised and regulated in the Criminal Code.<sup>63</sup> The

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<sup>57</sup> The South African Constitution, section 39(2) and the Sexual Offences Amendment Act, 2007, preamble, last paragraph.

<sup>58</sup> Konrad Zweigert and Hein Kötz *Einführung in die Rechtsvergleichung* (3. ed.) Tübingen 1996, p 68.

<sup>59</sup> A difference is that the prohibition on analogies does not apply to civil law, Ernst A. Kramer *Juristische Methodenlehre* (3. ed.) Bern 2010, p 39-40.

<sup>60</sup> *Op. cit.* p 172.

<sup>61</sup> *Op. cit.* p 57 and p 85.

<sup>62</sup> German name Prostitutionsgesetz.

<sup>63</sup> German name Strafgesetzbuch.

Criminal Code entails own interpretation rules in section 1, stating that punishment can only be applied to acts explicitly criminalised by the Criminal Code.<sup>64</sup> This makes the ordinary meaning of the wording of special importance.

Norway has a mixed legal tradition, with elements from both civil and common law.<sup>65</sup> There is a strong tradition for law making, but case law is also important. The legal method is focused on many sources, where the wording, the preparatory work and case law are central. The importance of the preparatory work is a special feature of Nordic law, Norway being no exception to the rule.<sup>66</sup> The acts themselves are short, and the preparatory work entails guidelines on how they are to be interpreted. The act of selling sexual services is not criminalised, but buying sexual services, and other surrounding activities are criminalised. The principle of the rule of law and therefore the importance of the wording is therefore central to the interpretation. The surrounding activities to prostitution are regulated in a chapter in the Criminal Code, and this is to be interpreted in light of the whole Criminal Code. The words are to be interpreted coherently within the Criminal Code.

#### 1.5.4 Harmonizing of the legal sources

Harmonizing means how the sources relate to each other and how they will be used in the presentation and comparison of the law of the legal effect of consent to the sale of sexual services. Because this thesis is a comparative study, the acts will not be studied to the uttermost detail. The acts will be studied with such detail as is necessary to extract the regulation of the legal effects of consent to the sale of sexual services.

As we have seen, the sources are of different nature and the technique for making and interpreting them is very different, thus making a comparison complicated. One cannot answer the research question with a single conclusion on how the law in force today is. This is because the thesis partly is about international law and partly about three different national regulations. It is not intended to harmonise all of these into one rule.

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<sup>64</sup> More in Kramer *ibid.* German wording “Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde”.

<sup>65</sup> Norway is part of the Nordic Law tradition; see Gerhard Ring und Line Olsen-Ring, *Einführung in das Skandinavische Recht*, München, 1999, p 1 et seq.

<sup>66</sup> Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäli (eds.) *Nordic Law – Between Tradition and Dynamism* Antwerp – Oxford 2007, p 103 and Ring 1999, p 9.

One of the aims of the thesis is to show that there is a discrepancy in the regulation. The different legal sources for the thesis will be harmonised internally. The interpretation of CEDAW article 6 will be carried out on the basis of the respective relevant sources, and these sources will be harmonised. The national legal sources will be harmonised in order to determine the respective national rules.

Enforcement of the regulation is of special interest, both internationally and in the three countries. This is because none of them are being implemented and enforced as intended by the legislator. In a study of this topic one must therefore also take reality into account, and take a look at the enforcement of the treaties and acts. It is interesting that the three countries are implementing CEDAW article 6 through fundamentally different national regulations. There is no enforceable authoritative interpretation of the articles in CEDAW, and this leads to a varied implementation. The Committee has competence to interpret the articles, but there is no law enforcement institution that can enforce this interpretation. The lack of enforcement is one of the challenges for international law today.

The national law also shows a discrepancy between the laws and their enforcement. Because the police are not prosecuting as much as could be expected on these paragraphs and sections, the reality on the streets is different to that envisioned in the regulation. This enforcement leads to an interesting relation between legal acts and case law. In South Africa and Germany the courts have played an important role in the reform process. In South Africa it was the *Jordan* case<sup>67</sup> that led to the criminalisation of clients. In Germany, it was a judgement from the Federal Administrative Court that first deemed prostitution immoral,<sup>68</sup> and later a judgement from the Berlin Administrative Court<sup>69</sup> that led to prostitution no longer being deemed as immoral. This was the spark for the law reform process that resulted in the Prostitution Act. In Norway, the law reform process has been on a more political level, without the involvement of the courts to such a degree.

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<sup>67</sup> Constitutional Court of South Africa, *S v Jordan and Others*, 09.10.2002, /CCT31/01)[2002]ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117.

<sup>68</sup> *Die Astrologieentscheidung*: The Federal Administrative Court, (German name Bundesverwaltungsgericht) 04.11.1965. Printed in *Entscheidungen des Bundesverwaltungsgerichts*, Band 22, Berlin 1966, p 286.

<sup>69</sup> The Berlin Administrative Court, 01.12.2000, (German name Berliner Verwaltungsgericht), printed in NJW 2001, p 983 (Neue Juristische Wochenschrift).

### 1.5.5 Reasoning behind the chosen method

This method has been chosen because it can best answer my research question. I am choosing not to look at CEDAW in isolation, because the national comparison shows how CEDAW is implemented. Looking at CEDAW in isolation would only reveal part of the picture.

I am using legal acts and international treaties because these are binding. One could have used legal literature and principles or values, from a *de lege ferenda* perspective.<sup>70</sup> That would have meant to answer the research question from a law making perspective, relatively independently from the law in force today. I am answering it from a *de lege lata* perspective,<sup>71</sup> relating to the sources in force today, and will be trying to make recommendations within the framework of the existing legal regulations. One could possibly make better recommendations if one was freer from the sources in force, because one could then build up a new system from the start. But this would be utopian and would probably not get very far in practical life. I have therefore chosen to look at the sources in force today, and to try to make recommendations that can be implemented.

Another alternative would be to focus strictly on the law in force and not on how it is enforced. However, this would also lack a dimension, because of the difference between the law in books and the law in practice in this field of law.<sup>72</sup> One will have to look at the enforcement to be able to describe how the law on prostitution of today works, with its positive and negative aspects.

### 1.6 The research situation today

There is much research on prostitution and trafficking in general, but not so much from a legal perspective. Research is mostly done within the fields of sociology, criminology and political science. There is some comparative research on prostitution; for example, Susanne Dodillet has compared the political debate around the legal reforms in Germany

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<sup>70</sup> See note 18.

<sup>71</sup> See note 17.

<sup>72</sup> Similar, with reference to the need for support from the sociology of law for legal comparison, Zweigert/Kötz p 70.



and Sweden.<sup>73</sup> This was done from a political science perspective. Also, there is some research on the distinction between trafficking and prostitution, for example by May-Len Skilbrei from a sociological perspective.<sup>74</sup> Research on the legal effects of consent to the sale of sexual services from a legal and comparative perspective is apparently not available.

## 1.7 The structure of the thesis

The thesis will start with a chapter about the history of the legal regulation of consent to the sale of sexual services, internationally and in the three countries. This is not meant to be a complete presentation of the different legal regulations throughout history, but merely a brief overview to show how the regulation has evolved. This will show how the philosophical foundations of morals and pragmatism have influenced the regulations.

After the history chapter, the chapters on international law and the countries will follow. The part on international law deals with CEDAW article 6 and how it is to be interpreted and how it relates to the Palermo Protocol and the other legal instruments regulating forced prostitution. The chapters on the countries will show how CEDAW is being implemented nationally. The national chapters will also deal with how the countries are regulating prostitution and consent in general. I will start with South Africa and Germany to show the two outermost possibilities of regulation, and end with Norway, which places itself somewhere between the other two. The last part of the thesis will form a conclusion, where I will sum up my findings and present some recommendations for the further development of the regulation.

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<sup>73</sup> Susanne Dodillet *Är sex arbete? Svensk och tysk prostitutionspolitik sedan 1970-talet*, 2009.

<sup>74</sup> May-Len Skilbrei *Taking Trafficking to Court*, In: Frances Bernat (ed.) *Human Sex Trafficking*, Routledge, 2010, and *Defining Trafficking Through Empirical Work. Blurred Boundaries and their Consequences*, in *Gender, Technology and Development* 12(1): 9-30, 2008.

## 2. The historical background of the legal regulation of prostitution

### 2.1 1850-1900: A pragmatic focus on disease

Between 1850 and 1900, prostitution was not regulated internationally. Prostitution was only regulated in the national laws. The early regulations in South Africa, Germany and Norway were influenced by the pragmatic tradition, with elements from the moral tradition.<sup>75</sup> The three countries all deemed prostitution as immoral. Prostitution was not legal, but tolerated in order to prevent the spread of disease. With the discovery of sexually transmittable diseases, all these societies used pragmatic measures to combat such diseases. It was generally accepted that prostitutes were spreading disease, and to suppress this, the countries enacted pragmatic laws regulating prostitution. Prostitutes in all three countries had to undergo medical checkups and in Germany and Norway even had to carry documentation on them proving that they had been tested.<sup>76</sup> Prostitutes were not seen as victims in this period. The victims of prostitution was society at large, suffering under the moral decay prostitution represented and the clients, whom one had to make sure did not become infected by the prostitutes.<sup>77</sup>

In South Africa, prostitution was not criminalised, but with a legal background in the Contagious Diseases Acts, the prostitutes' health was controlled.<sup>78</sup> The Acts had the purpose of preventing the spread of syphilis and gonorrhoea, and demanded compulsory medical testing and quarantine periods during sickness.

In Germany, prostitution was regulated at state level in this period. Prostitution and brothel keeping were mostly criminalised. One of the most important regulations is to be found in section 146 of the Prussian Criminal Code of 1851.<sup>79</sup> This section did not

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<sup>75</sup> See chapter 1.4 for more on these traditions.

<sup>76</sup> For example in Norway, cf. May-Len Skilbrei *Prostitusjon i tid og rom: Hvordan ble strøket til?* p 189, in Liv Jessen *Det ideelle offer*.

<sup>77</sup> See for Norway Skilbrei *op cit*, p 189.

<sup>78</sup> The first act was enacted in 1864, the next in 1866 and the last in 1869, cf. South African Law Reform Commission, Discussion Paper 0001/2009, Project 107, *Sexual offences, Adult Prostitution*, Pretoria 2009, p 72 (hereinafter referred to as *SALRC 2009*).

<sup>79</sup> German name: Preußisches Strafgesetzbuch. German wording: "Weibspersonen, welche den polizeilichen Anordnungen zuwider gewerbsmäßige Unzucht treiben, werden mit Gefängnis bis zu 8 Wochen bestraft". Found in Michael Bargon *Prostitution und Zuhälterei, Zur kriminologischen und*

criminalise prostitution as such, only prostitution that did not comply with local police orders. The police orders regulated the prostitutes' access to certain areas, and ordered them to regularly undergo health examinations, for the purpose of preventing sexually transmittable diseases. Brothels were also criminalised, but this was not implemented as intended. Despite the prohibition, the Government issued licences for brothel-like businesses.<sup>80</sup> The regulation in section 146 of the Prussian Criminal Code was made the federal regulation in Germany in 1871, in the Criminal Code of the Kingdom of Germany.<sup>81</sup>

In Norway, brothels and buying of sexual services became decriminalised with the Criminal Code of 1842; the sale of sexual services stayed criminalised.<sup>82</sup> The thought behind decriminalising the clients and legalising brothels was that it was better if men visited prostitutes than going after "honourable" women.<sup>83</sup> Because of the fear of diseases, the law was not enforced against the prostitutes, as long as the police doctor regularly controlled them, and they only sold sexual services in specially regulated areas.<sup>84</sup> The prostitutes that did not show up for control were prosecuted and sentenced to rehabilitation. Brothels became criminalised in 1884, and control of the prostitutes by the police ended in 1888.<sup>85</sup> The Norwegian regulation was a clearly pragmatic one, with a moral condemnation of prostitution, and a pragmatic regulation to prevent disease and protect "honourable" women.

## 2.2 1900-1950: A wave of moral regulation

After 1900, a more morally founded regulation of prostitution emerged. The view that the clients were victims of prostitution was to a great extent abandoned. The victims in this era were society and to some extent the prostitutes, being victims of trafficking and exploitation of prostitution. The idea that the prostitutes could be victims of prostitution was new.

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*strafrechtlichen Problematik mit einem geschichtlichen und rechtsvergleichenden Überblick*, Lübeck 1982, p 70.

<sup>80</sup> Katrin Malkmus *Prostitution in Recht und Gesellschaft*, Frankfurt am Main 2005, p 43.

<sup>81</sup> German name Reichsstrafgesetzbuch, see Bargon p 72 et seq.

<sup>82</sup> Both buying and selling sexual services had been criminalised with the Criminal Code of 1687.

<sup>83</sup> Ulf Strindbeck *Prostitusjon i Norge – realiteter, politikk og regulering*, in Nordisk Tidsskrift for Kriminalvidenskab 2005 p 54, on p 59.

<sup>84</sup> Skilbrei 2007 p 190, with reference to police regulations.

<sup>85</sup> Strindbeck p 59, with further references.

The early regulation on the international level was founded in a moral tradition, with elements of pragmatism. The first international regulation of prostitution and trafficking came with the International Agreement for the Suppression of “White Slave Traffic” in 1904.<sup>86</sup> This treaty focused on what was called the white slave trade, and the abuse of innocent people thereby – today referred to as trafficking. The convention deemed prostitution to be immoral, but it was not prostitution that was criminalised, it was the act of trafficking.<sup>87</sup> Consent of the victim was not even asked for, which shows that the trafficked prostitutes were seen as victims. This convention was applicable to both minor and adult females.<sup>88</sup>

The next international treaty came in 1910.<sup>89</sup> Prostitution was still deemed immoral and trafficking was a criminal act.<sup>90</sup> The convention distinguished between adults and minors when it came to consent. Trafficking of minors was objectively criminal; which means that it was criminal even if they consented.<sup>91</sup> Trafficking of adults was first a crime when carried out by means of threats or violence.<sup>92</sup>

These first two treaties applied only to female prostitutes, and regulated trafficking across a border. The irrelevance of consent shows that it was the act of trafficking for prostitution that was objectively viewed as immoral.

A child was defined as a person under the age of twenty-one,<sup>93</sup> and trafficking of children was made a crime regardless of the victims’ sex, with the Convention of 1921.<sup>94</sup> This convention began to blur the line between the international and national regulation, thus encouraging the member states to take internal measures to suppress trafficking, and to discover and help trafficked immigrants.<sup>95</sup> This Convention has been

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<sup>86</sup> International Agreement for the Suppression of the “White Slave Traffic”, adopted on 18.05.1904, came into force on 18.07.1905.

<sup>87</sup> Article 2 refers to trafficking victims as “destined for an immoral life”.

<sup>88</sup> Article 1.

<sup>89</sup> International Convention for the Suppression of the “White Slave Traffic”, adopted on 04.05.1910.

<sup>90</sup> Article 1, which criminalises trafficking and refers to “immoral purposes”.

<sup>91</sup> Article 1.

<sup>92</sup> Article 2.

<sup>93</sup> Article 5.

<sup>94</sup> Article 2 of the International Convention for the Suppression of the Traffic in Women and Children, adopted on 30.09.1921, came into force on 15.06.1922.

<sup>95</sup> Article 6 and 7.

criticised for confusing the signatories by the complicated distinction between international trafficking and commercialised prostitution.<sup>96</sup>

The next Convention was enacted in 1933, and made it punishable to traffic adult women, even with their consent, and regardless of the sex of the trafficker.<sup>97</sup> Also, women could now be punished for organising trafficking, not just men as in the earlier conventions. All four of these first conventions were based in the moral tradition, with an objectively regulated ban on trafficking. The elements of pragmatism do not change this. These treaties saw the prostitutes that had been trafficked, and society at large, as the victims of prostitution. None of them mentioned the situation of prostitutes that were nationals of the respective country and had not crossed a border.<sup>98</sup>

In 1950, these four first conventions were pooled in a new, comprehensive convention: the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>99</sup> This convention was mostly influenced by the moralist tradition, but also had elements of pragmatism. It was gender neutral, including both male and female prostitutes, and male and female traffickers.<sup>100</sup> This shows that they deemed the act of trafficking and exploitation of prostitution to be objectively immoral, without regard to the person of the victim or the offender. Prostitution was described as “incompatible with the dignity and worth of the human person and endanger[ing] the welfare of the individual, the family and the community”.<sup>101</sup> The consent of the victim was irrelevant; trafficking and exploitation of prostitution were seen as objectively criminal acts.<sup>102</sup> This is a clearly moralist view, and member states viewed the prostitutes themselves and society at large as the victims of prostitution. The pragmatic elements come to show in that the prostitutes were not to be subjected to “any exceptional requirements for supervision”.<sup>103</sup> In practice this regulation tolerated the sale of sexual services even though it was not legal. The focus on non-legal measures

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<sup>96</sup> Michelle O P Dunbar *The past, present and future of international trafficking in women for prostitution*, Buffalo Women's Law Journal, 1999-2000 Vol. VIII, p 103-128, on p 110.

<sup>97</sup> International Convention for the Suppression of the Traffic in Women of Full Age, adopted on 11.10.1933, came into force on 24.08.1934, article 1.

<sup>98</sup> The treaty of 1910 states that the detention of prostitutes in a brothel could not be dealt with in the convention, because it was “governed exclusively by internal legislation”, cf. Final protocol, letter d).

<sup>99</sup> Adopted by the UN General Assembly on 21.03.1950, came into force on 25.07.1951.

<sup>100</sup> See “another person” in article 1 and Dunbar 1999-2000, note 52 on p 111.

<sup>101</sup> The 1950-Convention, preamble.

<sup>102</sup> The 1950-Convention, article 1.

<sup>103</sup> The 1950-Convention, article 6.

such as education and other socio-economic measures further emphasises this. Many of these ideas came back later, in the Nordic model from around 2000 onwards. The significance of this convention is not great, due to a relatively small number of member states.<sup>104</sup> Some researchers explain that this convention never achieved greater popularity due to its lack of clear purpose, and the strict irrelevance of consent.<sup>105</sup>

The national laws moved to a more moralist regulation, and one started to focus on the surroundings of prostitution. The definition of who the victims of prostitution were changed as well, with more focus on the prostitute through acts that criminalised the surroundings of prostitution. There were no changes in the South African legislation in this period, but they conducted a law reform which started just at the beginning of the next period. The German Criminal Code of 1871 criminalised brothel keeping and pimping.<sup>106</sup> The Norwegian Criminal Code of 1902 decriminalised the sale of sexual services; but did not make it totally legal; soliciting for clients, however, was still criminalised.<sup>107</sup> The same act criminalised pimping and brothel keeping.

### **2.3 1950-2000: Reformed pragmatism and a new moral**

There had been a thirty-year break in international law-making before the Convention on Elimination of all forms of Discrimination Against Women, CEDAW, came into force in 1979. CEDAW article 6 is based in the moralist tradition, objectively aiming to “suppress all forms of trafficking and the exploitation of the prostitution of women”.<sup>108</sup> Article 6 in CEDAW was a compromise between the moralist and the pragmatic tradition. CEDAW is the international instrument regulating prostitution and trafficking with the highest support internationally, shown in that it has the most member states.<sup>109</sup> CEDAW is therefore close to being legally binding world-wide.

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<sup>104</sup> Pr 31.05.2011 the Convention had 25 Signatories and 81 Parties, cf.

[http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg\\_no=VII-11-a&chapter=7&lang=en#Participants](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=VII-11-a&chapter=7&lang=en#Participants).

<sup>105</sup> Sandvik, p 33.

<sup>106</sup> Criminal Code section 180a on brothels, in force in various editions 1973-1992, and section 181 on pimping, in force in various editions 1872-1973.

<sup>107</sup> The Norwegian Criminal Code section 378.

<sup>108</sup> CEDAW, article 6.

<sup>109</sup> 186 member states, which is a 90% ratification rate among the UN states, cf.

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) pr 31.05.2011.

South Africa enacted a larger law reform on the area of prostitution in the early phase of this period. Most of the surroundings of prostitution became criminalised with the Immorality Act of 1957.<sup>110</sup> As the name suggests prostitution was deemed to be immoral, and the lawmakers explicitly placed themselves in the moralist tradition. Brothel keeping was criminalised, and the act also regulated persons deemed to be keeping a brothel.<sup>111</sup> Both active and passive pimping was criminalised. Active, meaning assisting in bringing about the sale of sexual services, or receiving any profit for such sale, and passive, meaning living off the earnings of prostitution.<sup>112</sup> In 1988 the sale of sexual services also became criminalised.<sup>113</sup>

Between 1945 and 1990, Germany was divided into the Federal Republic of Germany, FRG,<sup>114</sup> and the German Democratic Republic, GDR.<sup>115</sup> The two states regulated prostitution differently. Prostitution was legal in the GDR between 1945 and 1968, even though the ruling party, the Socialist Unity Party,<sup>116</sup> was against prostitution. Directly after the war, they viewed it as a necessary evil because of poverty and the lack of other options.

There were laws against the spread of sexually transmittable diseases, which were used to control the health of the prostitutes.<sup>117</sup> The Criminal Code from before the war was still applicable in part, and the sections regarding prohibition on brothels and pimping was applicable in both the GDR and the FRG.

In the mid-1950s, prostitution was seen as an inheritance from capitalism and the war, and did not have a place in a socialist society with economical, political and legal equality between the sexes. The prostitutes were met with educational measures and retraining to other occupations. Prostitution was criminalised in the GDR in 1968, but

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<sup>110</sup> Act 23 of 1957, adopted on 03.04.1957, came into force on 12.04.1957. Later amended and renamed The Sexual Offences Act.

<sup>111</sup> The Sexual Offences Act section 2 and 3.

<sup>112</sup> The Sexual Offences Act section 20(1)a) and c).

<sup>113</sup> The Sexual Offences Act section 20(1A)a).

<sup>114</sup> The western part, German name Bundesrepublik Deutschland, BRD.

<sup>115</sup> The eastern part, German name Deutsche Demokratische Republik, DDR.

<sup>116</sup> German name Sozialistische Einheitspartei Deutschland, SED.

<sup>117</sup> Act of 1947 to combat transmission of sexually transmittable diseases amongst the German population in the Soviet occupied zone in Germany, (Verordnung zur Bekämpfung der Geschlechtskrankheiten unter der deutschen Bevölkerung in der sowjetischen Besatzungszone Deutschlands), see Dodillet p 561, with further references.

the law was practically not enforced. The state did not enforce the act both because it tried to create a public image that prostitution no longer existed in the GDR, and because of national intelligence measures.<sup>118</sup>

In the FRG prostitution was legal, but it was not promoted. In a judgement by the Federal Administrative Court<sup>119</sup> from 1965 the court saw prostitution to be damaging to the society.<sup>120</sup> The court deemed prostitution equal to professional criminals. The judgement led to all contracts in relation to prostitution being deemed to be against the morals and customs, and a contract regarding prostitution was an immoral transaction.<sup>121</sup> Pursuant to the German Civil Code § 138(1) all transactions that are against public morals are considered to be void.<sup>122</sup> This meant that if there was a problem with the transaction, the prostitute could not build a claim on this agreement. The prostitutes had few social rights, and they had to undergo medical checkups regularly.<sup>123</sup> The controls had their legal background in the Act on Sexually Transmittable Diseases section 4, 15.<sup>124</sup>

After the reunification of Germany in 1990, the laws of the FRG became the new law for the united Germany. The regulation based on the concept of prostitution being immoral became applicable in the whole of Germany.<sup>125</sup>

Norway focused on the surroundings of prostitution in this period. In 1963, the regulation on pimping was supplemented by a new section regulating passive pimping, meaning living off someone else's earnings from prostitution.<sup>126</sup> This section was only directed at men, based on the idea that prostitutes are women and pimps and clients are

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<sup>118</sup> There is evidence that the Secret Police, in German the Stasi, used the prostitutes as informants to spy on the FRG and, in exchange, the prostitutes did not get prosecuted. See Ingrid Sharp *The sexual unification of Germany*, in *Journal of the History of Sexuality*, Vol. 13, No 3, July 2004, pp 348-365, p 351-352 and Dodillet p 561-563, with further references.

<sup>119</sup> The Federal Administrative Court (Bundesverwaltungsgericht) is the highest instance of the general administrative courts. It decides matters regarding federal administrative law, Ingrid Simmonnæs *Tysk rett, en oversikt*, 1993, p 127.

<sup>120</sup> The "*Astrologieentscheidung*" (The Astrology judgement), Bundesverwaltungsgericht 04.11.1965. Printed in *Entscheidungen des Bundesverwaltungsgerichts*, Band 22, Berlin 1966, p 286.

<sup>121</sup> In German referred to as "sittenwidriges Geschäft".

<sup>122</sup> German name Bürgerliches Gesetzbuch, BGB. English translation of section 138(1) reads "A legal transaction which is contrary to public policy is void".

<sup>123</sup> This is similar to the regulation in South Africa and Norway in the 18<sup>th</sup> century, see chapter 2.1.

<sup>124</sup> German name Gesetz zur Bekämpfung der Geschlechtskrankheiten, (GeschlKrG), of 23.07.1953.

<sup>125</sup> See article 23 of the Federal Basic Law and Sharp p 349.

<sup>126</sup> Cecilie Høigård and Liv Finstad *Bakgater*, Oslo 1993, p 334.



men. The earlier section on pimping had been limited to active pimping, meaning someone profiting from someone else's prostitution, and this being done with intent. The enforcement of the laws against soliciting was almost eliminated. The last time the relevant sections of the Criminal Code and the Vagrant Act were used against prostitutes was in 1968.<sup>127</sup> During this period, the courts became more involved in the legal development by delivering many judgements regarding pimping and brothel keeping.<sup>128</sup>

## 2.4 2000 and onwards: A new wave of regulations – pragmatism and morals side by side

With the emerging sex worker movement in the late 1970s and 1980s, and the major growth in trafficking for prostitution around 2000, the debate on prostitution changed. Some countries started regulating prostitution more pragmatically, and with a different reasoning than before. There was a wave of decriminalisation, in some countries only the sale, and in others both the sale and the buying became decriminalised. The different countries in the world were divided in their definition of who the victims were. As before, some saw the prostitute and society as victims.<sup>129</sup> What was new was that some countries no longer deemed prostitution to have any victims, in saying that the prostitute was not a victim and that one had to respect the choice of the prostitute.<sup>130</sup>

The Palermo Protocol of 2000 picked up the thread from the early conventions on trafficking, by regarding the victims' consent as irrelevant in some situations. In certain circumstances, which were objectively described, a victim's consent to trafficking did not make the act legal – it was objectively criminalised.<sup>131</sup> This indicates that the trafficked persons were seen as the victims of prostitution. The Palermo Protocol also saw the widespread trafficking as a problem to be solved by global society as a whole, and thereby society was also being made a victim of trafficking for prostitution.<sup>132</sup>

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<sup>127</sup> Norwegian name Løsgjengerloven. See Høigård and Finstad p 335.

<sup>128</sup> Høigård and Finstad p 337.

<sup>129</sup> Such as Sweden who criminalised the buyers of prostitution in 1999, Act 1998:408, adopted on 29.05.1998, came into force on 01.01.1999, now regulated in Chapter 6 section 11 of the Criminal Act – Brottsbalken of 1962.

<sup>130</sup> For example the Netherlands that legalised prostitution through lifting the ban on brothels in 2000, cf. SoFFI Report p 36 .

<sup>131</sup> The Palermo Protocol, article 3a).

<sup>132</sup> The preamble to the Palermo Protocol, first section.

South Africa criminalised buying sexual services in 2007, after the *Jordan* case before the Constitutional Court in 2002. A minority of the judges deemed the one-sided criminalisation to be unconstitutional.<sup>133</sup> The South African reasoning behind criminalising the clients was that prostitution as a whole is immoral, and that it would be wrong to only criminalise one part in this immoral act.

Germany changed its pragmatic, but strict, moral regulation to a total decriminalisation of prostitution in 2002. With the Prostitution Act, prostitution remained legal, and was no longer deemed as immoral. The surrounding elements of prostitution also became partly decriminalised.<sup>134</sup> Under the new regulation, a contract regarding prostitution is no longer void under the provision in BGB section 138 (1),<sup>135</sup> and is therefore to be seen as a transaction like any other. The prostitutes now have a legal claim on the agreed money.

With the criminalisation of clients in Norway in 2009, one saw a new form of moral condemnation. The Norwegian reasoning was new, in that it morally condemned the clients' acts, but not because prostitution as such was immoral. It merely regarded the act of the client as immoral; to sell sexual services was not viewed as immoral. The one-sided criminalisation was justified with an analysis of the power relations in prostitution. Norway views the buying of sexual services as an abuse of the prostitutes' vulnerable situation. This has a link to the definition of trafficking in the Palermo Protocol, which also focuses on the vulnerable situation of the victims of trafficking.<sup>136</sup>

## 2.5 Conclusion

This historical overview shows that the moral and the pragmatic regulation of prostitution have been living side by side for a long time, and that the regulations have shifted between these two traditions. This area of the law has changed considerably. Comparing the situation today to the view of prostitutes before 1900, the situation for the prostitutes has drastically improved. However, despite the improvements, there is much that can be done to improve the conditions under which the prostitutes work,

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<sup>133</sup> The *Jordan* case, paragraph 121.

<sup>134</sup> Bundestagsdrucksache 14/5958, p 6.

<sup>135</sup> German name Bürgerliches Gesetzbuch.

<sup>136</sup> The Palermo Protocol, article 3a).

regardless of the legal regulation under which they are operating. The rapid evolvments of both national and international law shows that the debate on prostitution is returning to the legal and political debate.

### 3. International regulation of the legal effect of consent to prostitution

#### 3.1 The Convention on Elimination on all forms of Discrimination Against Women - CEDAW

##### 3.1.1 Introduction to CEDAW

The Convention on Elimination on all forms of Discrimination Against Women, CEDAW, is the first comprehensive treaty regulating women's human rights.<sup>137</sup> The treaty also has the highest number of member states among the instruments regulating prostitution, and has legally binding effect almost globally. The content of CEDAW article 6 was originally stated in article 8 of the Declaration on Elimination of all Discrimination Against Women, DEDAW, of 1967.<sup>138</sup> This was, as the name implies, only a declaration, with limited legal weight in comparison to CEDAW, which is legally binding and has high legal weight. The main focus of CEDAW is to combat discrimination of women, and all main areas of discrimination are covered in separate articles.

##### 3.1.2 Interpretation of the rights granted in CEDAW article 6

CEDAW regulates prostitution in article 6. The wording reads "State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". The regulation of prostitution is short, and the convention does not state the intention behind this article. The focus is on presumed involuntary prostitution, in that it focuses on trafficking and exploitation. As with the 1950 Convention, the focus of the regulation of prostitution is on the facilitators, not on the prostitute. Prostitution is not criminalised, just the exploiters of the prostitution of others.<sup>139</sup> The interpretation of article 6 raises two important questions; firstly, whether the wording is to be understood as having two components, and secondly, what kind of prostitution is to be included in the wording.

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<sup>137</sup> See chapter 1.5.1 and 2.3 for more on CEDAW.

<sup>138</sup> Lars Adam Rehof *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, Dordrecht, The Netherlands 1993, p 90, with further references.

<sup>139</sup> Dunbar note 52 on p 112.

The first question is whether the wording is to be interpreted as having two components. The starting point is that the wording is to be interpreted with the ordinary meaning of the words of the treaty in their context and in the light of the object and purpose of the treaty.<sup>140</sup> The ordinary meaning of the wording implies that it has two components: “traffic in women” and “exploitation of prostitution”. There are no legal definitions in the Convention clarifying how this is to be interpreted. The object and purpose of CEDAW is to combat discrimination, and this implies that the wording is to be interpreted in the way that best combats discrimination. If the wording was to have only one component (exploitation of prostitution of women by trafficking) this would only regulate the situation of victims of trafficking, not of victims of other exploitation of prostitution. Such interpretation would limit the scope of application of the article, and would only combat a part of the possible exploitation to which prostitutes can be subjected. The purpose of CEDAW is to eradicate all forms of discrimination against women, and this implies that the purpose is to have a broad cover. This is an argument for the wording to be interpreted as having two components.

From the country reports, it seems as if the state parties disagree on whether the article is intended to have two parts.<sup>141</sup> Many countries, such as Germany, have not commented separately on the part on “exploitation of prostitution”. Other countries, such as South Africa, have commented on both components separately.<sup>142</sup> The Committee has also expressed a need for clarification of the duties under article 6.<sup>143</sup> Such specific clarification has until now not been issued.<sup>144</sup> However, the Committee has commented on the duties in the different concluding observations to the state reports, for example to the South African report of 2010. The Committee focuses separately on trafficking, and in their remarks on “exploitation of prostitution” they do not distinguish between the exploitation of trafficked and non-trafficked prostitutes.<sup>145</sup> This implies that they

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<sup>140</sup> The Vienna Convention, see chapter 1.5.2, and Andrew Byrnes *The Convention on the Elimination of all forms of Discrimination Against Women*, in Wolfgang Benedek, Esther Mayambala Kisaakye and Gerd Oberleitner (eds.) *Human Rights of Women. International Instruments and African Experiences*, ZED Books 2002, p 119-172, p 121.

<sup>141</sup> Also, other legal scholars find that various opinions seem to exist on what the duty under article 6 entails, for example Sandvik p 65.

<sup>142</sup> The South African report combined second, third and fourth country reports, dated 24.03.2010, CEDAW/C/ZAF/2-4, p 65 and 70.

<sup>143</sup> CEDAW/C/1995/1, paragraph 358.

<sup>144</sup> As of 31.05.2011.

<sup>145</sup> CEDAW/C/ZAF/CO/4, paragraph 27 and 28.

consider article 6 to have two components. The ordinary meaning of the wording and the purpose of the Convention together with the Committee's practice, leads to the conclusion that article 6 has two components: "traffic in women" and "exploitation of prostitution of women".

### 3.1.3 "Exploitation of prostitution"

The second question is what kind of prostitution is intended to be eradicated with article 6: prostitution per se, or a form of exploitation of someone else's prostitution. The ordinary meaning of the wording "exploitation of prostitution" refers to the act of exploiting a prostitute, not prostitution per se. During the preparation of CEDAW it was discussed whether the article should be worded to ensure that all forms of prostitution could be combated, thus eradicating prostitution per se. Morocco proposed a wording stating, "State Parties shall take all appropriate measures, including legislation, to suppress prostitution, traffic in women and exploitation of prostitution of women in all its forms". This was rejected by 48 votes to 19, with 46 abstentions.<sup>146</sup> It is therefore clear that the countries intended article 6 to only cover exploitation through prostitution, not prostitution per se. Based on the ordinary meaning of the wording, together with the preparatory work, one has to conclude that the wording is to be interpreted as to apply to the case of someone exploiting the prostitution of a woman, not to prostitution per se.

The next question is how "exploitation of prostitution" is to be interpreted. What this is to mean in detail is not stated anywhere, and the CEDAW Committee has also not clarified this. There are few legal sources to determine the interpretation. The ordinary meaning of "exploitation" is to treat someone unfairly, making money from someone else's work, or using a situation in order to obtain an advantage for oneself.<sup>147</sup> This implies that it is the act of making a profit from someone else's prostitution that is to be included by the wording. This could fit very well in the context of the article with the reference to trafficking, which also focuses on third parties' involvement in prostitution. On the basis of the preparatory work and the context, the wording is to be interpreted to at least cover third parties making a profit from someone else's prostitution.

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<sup>146</sup> Rehof p 91.

<sup>147</sup> A S Hornby *Oxford Advanced Learners Dictionary of Current English*, 7.ed, Oxford 2005, under "exploitation".

The next question is whether anything else also should be included in the scope of application of “exploitation of prostitution”. The natural meaning of the wording indicates that cases in which a prostitute is treated unfairly, or a third person is obtaining an advantage, are also to be included. Such interpretation would include unfair conditions for the performance of prostitution, such as the refusal of access to condoms, and cases in which a third person is obtaining a non-monetary advantage. A narrow interpretation, which only includes monetary profit, would limit the scope of application of the article. Such narrow interpretation would not include cases in which a prostitute is exploited in other ways. There are no indications in the preparatory work or the subsequent practice indicating that such narrow interpretation is to be applied. The natural meaning indicates a wider interpretation. The context of the article can also be an argument for a wider interpretation. The wording is “all forms of traffic in women and exploitation of prostitution”. This indicates that all forms of exploitation are meant, not only monetary. With support from the natural meaning of the wording in its context “exploitation of prostitution” is to be understood as monetary and other forms of exploitation of prostitutes.

One can also question whether buying sexual services is a form of exploitation of prostitution. The client is obtaining a non-monetary advantage that he or she would not have received without payment. The client is in one sense exploiting the prostitutes’ need for money, and, by offering money, he or she receives sexual services in return. This can be seen as exploitation. Sandvik argues that article 6 may be interpreted as giving the client a legal responsibility as an accomplice to the pimp’s actions.<sup>148</sup> However, as this was not intended by the makers of the Convention, and has not been visible in subsequent state practice, to interpret a client’s responsibility would be too wide an interpretation of the article.

The conclusion after this is that “exploitation of prostitution” includes both cases in which a third party receives a monetary or other profit from someone else’s prostitution, and cases in which someone in another way exploits a prostitute.

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<sup>148</sup> For more on this question, see Sandvik p 68-69.

### 3.1.4 “All forms of traffic in women”

The next question is how “all forms of traffic in women” is to be interpreted. The ordinary meaning of the wording “all forms” includes any kind of trafficking carried out by any means. This includes trafficking of under-age and adult women, and by male or female traffickers. Such interpretation is supported by the preparatory work. The preparatory work shows that the ban on trafficking was meant as a reference to the Convention of 1950.<sup>149</sup> CEDAW article 6 builds on article 8 of the DEDAW and article 9 of the first Philippines draft convention. The Convention of 1950 regulated trafficking of adults and minors, perpetrated by male and female traffickers, contrary to previous conventions, which had only regulated special forms of trafficking, i.e. only minors, or only by male traffickers. Based on the ordinary meaning of the wording and the preparatory work, one can conclude that “all forms of traffic in women” includes trafficking of adults and minors, perpetrated by male or female traffickers.

Another question is whether “all forms of traffic” are limited to trafficking for the purpose of prostitution, or if trafficking for other purposes is also to be included.<sup>150</sup> The ordinary meaning of the wording implies that it is applicable to trafficking for any purpose. The context of the article on the other hand implies that it refers to trafficking for the purpose of prostitution. There are no other articles in CEDAW that regulate trafficking for other purposes, such as an article granting the right to freedom from slavery. At the time of adoption of CEDAW, trafficking for other purposes, such as forced labour, was not debated and the preparatory work does not indicate that other purposes were intended to be included.

A narrow interpretation, making the article only applicable to trafficking for prostitution, would not protect women trafficked for domestic work and other purposes. The number of women trafficked for such purposes are not as high as the number of women trafficked for prostitution, but they still make up a large number of persons.<sup>151</sup>

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<sup>149</sup> Both the Philippines and Austria were of the opinion that one did not require a thorough description in CEDAW article 6, because it was already well covered in the Convention from 1950, cf. Rehof p 90 with further references. See chapter 2.2 for more on the 1950 Convention.

<sup>150</sup> Such as trafficking for sexual exploitation through domestic labour and organized marriages, cf. CEDAW General Recommendation 19, section 14. Also for non-sexual purposes such as exploitation through other kinds of work or for the purpose of organized begging. Trafficking for these purposes is regulated in the Norwegian Criminal Code section 224 b).

<sup>151</sup> German Institute for Human Rights, by Petra Follmar-Otto Heike Rabe, *Human Trafficking in Germany - Strengthening Victim's Human Rights*, Berlin 2009, p 18-19.



The main purpose of CEDAW is to combat discrimination, and this purpose is meant to have broad coverage. The purpose of CEDAW could therefore be an argument for a broader interpretation, including trafficking for other purposes. However, because of the lack of other sources supporting such interpretation, one must conclude with that CEDAW only applies to trafficking for the purpose of prostitution.

Sandvik argues that article 6 is to include trafficking also within the borders of a country, and for all purposes. In her argumentation, the important feature is that the woman is moved to an area in which she is not familiar with the culture and the language and may even be physically isolated and without a legal identity and legal knowledge and is thus in a vulnerable situation and at risk to being exploited and abused.<sup>152</sup> The fact that the woman is in a vulnerable situation, where discrimination is likely to occur, makes such interpretation plausible, in light of the object and purpose of CEDAW. Thus, national border crossing is not a criterion for something to be deemed trafficking in CEDAW article 6.

There is some subsequent practice from the CEDAW Committee on how “all forms of traffic” is to be interpreted. The CEDAW Committee has considered one case regarding article 6, case number 15 of 2007.<sup>153</sup> The victim was a young woman who had been trafficked from China to the Netherlands. The case concerned the protection from trafficking, and the question was whether the Netherlands had violated the victims’ right to protection from trafficking. The majority of the Committee deemed the case to be inadmissible due to the lack of exhaustion of available domestic remedies.<sup>154</sup> A communication cannot be considered by the Committee before “all available domestic remedies have been exhausted”, cf. CEDAW Optional Protocol, article 4(1). The majority held that the domestic remedies had not been exhausted because the victim had not raised CEDAW article 6 as a separate ground before the Dutch courts in the asylum proceedings, and because the application for judicial review of the residence permit was still pending.

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<sup>152</sup> Sandvik p 57.

<sup>153</sup> The Case between Ms Zhen Zhen Zheng and the Netherlands of 2008, case reference CEDAW/C/42/D/15/2007.

<sup>154</sup> *The Zhen Zhen Zheng* case paragraph 7.4(a).

The minority, consisting of three members from a total of seventeen, found the application to be admissible.<sup>155</sup> It was in their opinion, not the victims' fault that her rights under CEDAW article 6 had not been an issue in the asylum case and in the application for a residence permit. They found that these proceedings did not make the communication inadmissible, because it was the Dutch officials that should have guided her better, i.e. told her to raise CEDAW article 6 as a separate ground, and used the special Dutch system for protection of victims of trafficking. They stated that the state is under the duty to "have law enforcement officials adequately trained so as to identify victims of such crime and inform them of the avenues under which they can seek protection."<sup>156</sup> The minority used and referred explicitly to the definition of trafficking found in the Palermo Protocol article 3. In their view the Dutch officials should have understood that she was a victim of trafficking, based on her telling of being forced to sleep with men, being raped several times and being locked in a house.<sup>157</sup> The minority found that the Dutch officials "did not act with the due diligence that the author's<sup>158</sup> situation required by failing to recognize that she might have been a victim of trafficking in human beings and [to] inform her of her rights [accordingly]".<sup>159</sup> The minority concluded with that there had been a violation of the victim's rights under article 6, and recommended that the Dutch officials should take steps to determine whether she had been a victim of trafficking, and, if so, to provide her with measures of protection as provided for under article 6 of the Palermo Protocol.<sup>160</sup> The minority actively referred to, and used, the definition of trafficking in the Palermo Protocol – not just for their interpretation of CEDAW article 6, but also for how to remedy the violation of that article.

This is a minority judgement, from a small minority, and therefore has very limited legal weight. It is not used here as a source stating what the legal situation is today, but due to a lack of other sources it is drawn in as a hint of how the legal situation may come to evolve.

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<sup>155</sup> *Op. cit.* paragraph 8.2.

<sup>156</sup> *Op. cit.* paragraph 8.1.

<sup>157</sup> *Op. cit.* paragraph 8.6.

<sup>158</sup> The Committee calls the person who has submitted the communication "authors".

<sup>159</sup> *Op. cit.* paragraph 8.7.

<sup>160</sup> *Op. cit.* paragraph 9.1, I.

It is not clear how the CEDAW Committee will be interpreting “all forms of traffic in women”. There are good arguments for them interpreting this in line with the general international development in this area. A definition of trafficking has now been adopted in the Palermo Protocol article 3. This definition was adopted recently and therefore represents the current opinion, and based on the amount of member states, this is the opinion of the international community today. Another argument is that the definition in the Palermo Protocol coheres with the object and purpose of CEDAW and its preparatory work.

To sum up, it is not clear how “all forms of traffic in women” is to be interpreted. However, there are good arguments for it being interpreted in line with the definition in the Palermo Protocol, including trafficking of adults and minors, perpetrated by male or female traffickers.

### **3.1.5 The legal effect of consent in relation to CEDAW**

CEDAW does not explicitly regulate the question of possible consent of the woman to trafficking or prostitution. The ordinary meaning of the wording of both “traffic in women” and “exploitation of prostitution” implies an element of force; they both describe something that is not fully consensual. This implies that CEDAW regulates acts of prostitution that are not fully voluntary. The wording is short and there are few other sources to interpret the wording. The article does not ask for consent or an expressed non-consent. This can indicate that consent is not relevant, but there are no legal sources supporting this, so such assumption would have been made on a very limited legal basis. The fact that CEDAW is silent about consent cannot be an argument for or against the relevance of consent, and does not say anything about the legal effect of a possible consent.

One may still question the relationship between the components of CEDAW article 6 and consent, for example, whether article 6 is applicable to exploitation of both involuntary and voluntary prostitution. With voluntary prostitution, a situation is meant in which a prostitute entered prostitution without being forced.<sup>161</sup> The wording only states “exploitation of prostitution” and does not specify what kind of prostitution is relevant.

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<sup>161</sup> See chapter 1.3 for more about the use of the terms voluntary and forced prostitution.

The ordinary meaning of the wording implies that any form of prostitution is to be included, that the relevant act is the act of exploitation of a prostitute by taking advantage of him or her. One would then not require the prostitution as such to be involuntary or forced. Such interpretation would make CEDAW applicable to situations in which a prostitute entered prostitution voluntarily, but later is exploited. This would make CEDAW applicable in all member states, regardless of how they regulate prostitution in their national law. A narrow interpretation, i.e. assuming that CEDAW is only applicable to involuntary and forced prostitution, would discriminate against prostitutes who entered more or less of their free will. Many prostitutes enter prostitution due to the lack of other options, caused by structural discrimination in society.<sup>162</sup> The question of whether prostitution is entered voluntarily is highly debated. A narrow interpretation would exclude many prostitutes from the protection of CEDAW, based on a relatively unclear line between direct force and a relative voluntariness promoted by direct or indirect structural discrimination. A narrow interpretation would discriminate this group of prostitutes, because their exclusion from the scope of application of CEDAW would be a continuation of the structural discrimination which led to them entering prostitution in the first place.

Such narrow interpretation would not fulfil the object and purpose of combating all forms of discrimination against women. The object and purpose of CEDAW therefore implies that one should interpret the wording broadly, to include all prostitutes, regardless of how they entered prostitution. In summary, CEDAW has not explicitly regulated the question of consent, but, based on the ordinary meaning of the wording, and in light of the object and purpose of CEDAW, one can conclude that article 6 applies to the act of taking advantage of a prostitute, regardless of whether the prostitution as such was voluntary or involuntary.

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<sup>162</sup> Farley on p 118: "Prostitution is "chosen" as a job by those who have the fewest real choices available to them", with further references.

## 3.2 The Palermo Protocol

### 3.2.1 Introduction to the Palermo Protocols' regulation of trafficking

The Palermo Protocol regulates trafficking in human beings.<sup>163</sup> The protocol defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve consent of a person having control over another person, for the purpose of exploitation.”<sup>164</sup> This can be divided into three main elements; firstly the trafficker must somehow have participated in the transport, and secondly the transport must have been carried out by one of the listed means, and thirdly exploitation must have been the purpose of the transport. Exploitation is defined in the article to include “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.<sup>165</sup> There is no criterion that a national border is crossed.<sup>166</sup> The Palermo Protocol's definition of trafficking therefore includes many purposes, many more than the earlier conventions on trafficking, which solely regulated trafficking for prostitution.

### 3.2.2 The legal effect of consent in relation to the Palermo Protocol

The Palermo Protocol regulates the legal effect of consent. When it comes to trafficking of children, consent and the means by which the trafficking is carried out is not legally relevant. Consent from a child has no legal effect.<sup>167</sup> The question of adult consent is regulated in article 3(b), which states that “the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) has been used”. This means that, in cases in which an adult has consented to be trafficked, this consent is irrelevant if one of the means listed in the definition of trafficking has been used. These means are “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

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<sup>163</sup> See chapter 1.5.1 and 2.4 for more on the Palermo Protocol.

<sup>164</sup> Article 3(a), first sentence.

<sup>165</sup> Article 3(a), last sentence.

<sup>166</sup> German Institute for Human Rights, by Petra Follmar-Otto Heike Rabe, *Human Trafficking in Germany - Strengthening Victim's Human Rights*, Berlin 2009, p 16.

<sup>167</sup> Article 3(c).

receiving of payments or benefits to achieve consent of a person having control over another person”.

The wording “abuse... of a position of vulnerability” is highly debated. The ordinary meaning of the wording “vulnerable” is “weak and easily hurt physically or emotionally”.<sup>168</sup> In addition, a financially vulnerable situation is naturally to be included in this interpretation. A “position of vulnerability” is then to be in a position where one is weak and easily hurt, be it emotionally, physically or financially. Such interpretation would be applicable to situations where the trafficker takes advantage of the fact that the victim is living in poverty. An important aspect is that the position of vulnerability must be present in time before the act of trafficking takes place. After having been trafficked, almost all victims are in a position of vulnerability, in that they are in a foreign country without a network of friends and family, knowledge of the language and the culture.

### 3.3 A side glance: Regional instruments regulating prostitution and consent

In addition to this, some other international instruments exist regulating prostitution. They are used here to show how one regulates prostitution internationally. However, because South Africa, Germany and Norway have not all ratified these, they will not be studied in detail. The most interesting treaties are the Declaration of Belém do Pará and the European Convention on Human Rights. Both Germany and Norway are state parties to the European Convention.

The Convention of Belém do Pará is a regional instrument of the Inter-American Organization of American States, regulating violence against women.<sup>169</sup> This Convention has not been ratified by any of the countries compared in this thesis, South Africa, Germany and Norway. It is therefore not a legal source directly relevant for the thesis, and is only used here as an example of how this question is regulated in other jurisdictions. The Convention of Belém Do Pará, in article 3(b) grants every woman the right to freedom from “forced prostitution”. The right to freedom from forced prostitution is nothing revolutionary on the international level, cf. the Rome Statute.

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<sup>168</sup> Oxford Advanced Learners Dictionary, under “vulnerable”.

<sup>169</sup> The Convention was adopted on 09.06.1994, and came into force on 03.05.1995.

What is remarkable about the Belém do Pará Convention is that this is stated in a regional legally binding instrument. Where other regions don't even have a specific regulation of violence against women, the Inter-American states have a separate Convention, with detailed regulations.

The European Convention on Human Rights was adopted on 04.11.1950 and came into force 03.09.1953.<sup>170</sup> The Convention does not have a separate regulation of prostitution or sexual violence. There are no references to violence against women in the Convention at all. Even though there is no specific provision regulating consent to sexual acts, there is an interesting judgement from the European Court of Human Rights regarding the legal effect of consent to violent sexual acts. In the *Laskey, Jaggard and Brown* case, the European Court of Human Rights decided that punishment for consensual participation in dangerous sexually motivated acts was not a violation of the right to private life granted in article 8 of the Convention.<sup>171</sup>

The issue before the court was whether the punishment for assault for participation in consensual sadomasochistic activities for purposes of sexual gratification was a violation of the right to privacy. The question before the court was whether the interference in question was necessary in a democratic society for the protection of health, and if so, whether the measures were proportionate to the legitimate aim pursued.

The state argued that it had acted within its margin of appreciation. The court confirmed that this was a question to be determined by the states, and expressed that the state was "unquestionably entitled to ... regulate ... activities [of sexual conduct or otherwise] which involve the infliction of physical harm" in its criminal law.<sup>172</sup> The court supported its view by arguing "the determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the state concerned".<sup>173</sup> This is, because the level is to be determined based on a political balancing between public health considerations and the general deterrent effect of the

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<sup>170</sup> The full name: Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>171</sup> *Laskey, Jaggard and Brown v The United Kingdom*, European Court of Human Rights, 19.02.1997, (21627/93; 21826/93; 21974/93). See also Jørgen Aall *Rettsstat og Menneskerettigheter*, (2. ed.) Bergen 2007, p 56.

<sup>172</sup> *Laskey, Jaggard and Brown* paragraph 43.

<sup>173</sup> *Op. cit.* paragraph 44.

criminal law on the one side, and the personal autonomy of the individual on the other side.

The applicants argued that the state should not have prosecuted them because their injuries were not severe and no medical treatment had been required. The court did not agree to this, stating that the state was entitled to take “the potential for harm inherent in the acts in question” into consideration when determining whether to prosecute or not.<sup>174</sup> Because of the level of harm, which constituted a “significant degree of injury [and] wounding”, this case was distinguished from other cases before the court regarding the right to sexual acts perpetrated in private.<sup>175</sup> The acts in question regarded violence perpetrated against the genitalia, without infections or permanent damage, other than scarring.<sup>176</sup>

The Court found that the reasoning behind the prosecution was “relevant and sufficient” for the purposes of article 8(2),<sup>177</sup> and concluded that the measures taken were necessary in a democratic society for the protection of health, and did therefore not constitute a violation of article 8.<sup>178</sup>

Regardless of the legal importance of the Judgement, it shows that there are objective boundaries to what one can legally consent to under the European Convention.<sup>179</sup> The interesting fact is that consent has no legal effect when the harm of the action exceeds a certain level. Consent normally has legal effect, it is decisive for whether the action is legal or not. However, at a certain level of harm, consent becomes irrelevant. This level is reached in cases in which the action is “unpredictably dangerous”.<sup>180</sup>

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<sup>174</sup> *Op. cit.* paragraph 46.

<sup>175</sup> Citation from paragraph 45; with other cases the court referred to, among others, *Dudgeon v The United Kingdom*, European Court of Human Rights 22.10.1981, (Application No.7525/76), regarding the right to expression of consensual homosexual acts in private between adults.

<sup>176</sup> *Op. cit.* paragraph 8: “The acts consisted in the main of maltreatment of the genitalia (with, for example, hot wax, sandpaper, fish hooks and needles) and ritualistic beatings either with the assailant’s bare hands or a variety of implements, including stinging nettles, spiked belts and a cat-o’-nine tails. There were instances of branding and infliction of injuries which resulted in the flow of blood and which left scarring.”

<sup>177</sup> *Op. cit.* paragraph 48.

<sup>178</sup> *Op. cit.* paragraph 50.

<sup>179</sup> The legal importance is diminished because it is a matter within the “margin of appreciation” of the state, and because the judgement is old and has been highly debated in the legal world.

<sup>180</sup> *Op. cit.* paragraph 46.



Prostitution is “unpredictably dangerous”. It has been documented that prostitution is extremely violent. The prostitutes are subjected to violence from clients and pimps, both sexual and physical violence. Studies have shown that prostitutes are subjected to violence and suffer injuries more often than workers in what are considered dangerous occupations.<sup>181</sup> The occurrence of posttraumatic stress syndrome is high.<sup>182</sup> Prostitutes, whether in legal or illegal prostitution, have a much higher death rate than the general population.<sup>183</sup> Farley argues that prostitution meets or even exceeds the legal definition of torture.<sup>184</sup> After this, is it clear that prostitution is “unpredictably dangerous”. Had one used the same standards for involvement in prostitution, one would, with the rule from this judgement, have to conclude that one cannot legally validate consent to participation in prostitution. But this is only a theoretical argument, as long as various legal regulations of prostitution operate with legally valid consent to prostitution.

### 3.4 International regulation of the legal effect of consent to sexual acts

#### 3.4.1 Introduction

There are some international instruments regulating the legal effect of consent to sexual acts. These instruments are not directly applicable to the question of consent to the sale of sexual services, but they can say something about the relevance of consent, about what consent is, and about the legal effect of consent to sexual acts.

There are two main areas of focus in this subchapter. The first focus is on how prostitution is classified in international law if consent is not present. This is used to point out the discrepancy in law internationally where in some situations consent is regarded as being irrelevant, or of little legal effect, while in other circumstances there is no regulation of the legal effect of consent. The second focus is on international jurisprudence regarding the relevance of consent and the limits of the legal effect of consent to sexual activities.

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<sup>181</sup> Farley p 113, with reference to Erin Gibbs Van Brunschot et al., *Images of Prostitution: The Prostitute and Print Media*, 10 Women & Criminal Justice 47, 47 (1999).

<sup>182</sup> Farley p 116.

<sup>183</sup> *Op. cit.* p 114-115.

<sup>184</sup> *Op. cit.* p 122.

### 3.4.2 Classification of prostitution without consent

Prostitution without consent is, for example, regulated in the Rome Statute, which is the Statute of the International Criminal Court. The International Criminal Court was established as a result of the growing number of local tribunals and committees dealing with the legal process after a war. The case law developed by these organs became numerous and comprehensive, but were only directly applicable to the specific conflict, and only given in the aftermath of wars. The intentions behind the Rome Statute were to create general rules that were applicable before a conflict arose, and rules and case law that were applicable globally. The Rome Statute came into force on 01.06.2002, and has 114 member states.<sup>185</sup> The Rome Statute regulates war crimes and crimes against humanity, and in both of these, enforced prostitution is a separate sub-crime.

In article 7(1)(g) “enforced prostitution” is included in the definition of a “crime against humanity”. The general criterion for what constitutes a crime against humanity is that the act has to be “committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The interesting part here is that prostitution, which happens without or against the will of the prostitute, can constitute a crime against humanity.

“Enforced prostitution” as a war crime is regulated in article 8. This constitutes a war crime both in “international armed conflict”, article 8(2)(b)(xxii), and in “armed conflicts not of an international character”, listed in article 8(2)(e)(vi). The general criterion for what constitutes a war crime is that it happens during an “armed conflict”. These two articles show how international law classifies prostitution without consent in some specified situations. They show that, prostitution can be classified a crime against humanity, one of the worst acts applicable to humans.

### 3.4.3 Regulation of the legal effect of consent to sexual acts

The following sub-chapter is about case law regarding rape, and is not directly applicable to the question of consent to the sale of sexual services. It is also not an argument for an analogous interpretation or application. The case is drawn in here to

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<sup>185</sup> As of 12.10.2010, cf. <http://www.icc-cpi.int/Menus/ASP/states+parties/>, pr 31.05.2011.

show that, in other relatively similar areas of the law, the circumstances under which the sexual act happens is regarded to be legally relevant to the legal effect of consent.

There have been quite a few international court cases interpreting the definition of rape, and the newest and most comprehensive of them is the *Foča case* from the International Criminal Tribunal for the Former Yugoslavia.<sup>186</sup> This case criticised the former definitions as being too narrow,<sup>187</sup> and analysed international law to find a comprehensive definition of rape. The tribunal defined rape to be when a sexual act occurs and one or more of the following three elements are present: Force, without the victims consent, or in “circumstances, which made the victim particularly vulnerable or negated her ability to make an informed refusal”.<sup>188</sup> It thereby includes the circumstances under which the sexual act occurred, into the assessment of whether this was a romantic sexual encounter or a rape constituting a crime against humanity. The relevant circumstances focus on a status of vulnerability and deception. The description of these circumstances is, where “the victim was being put in a state of being unable to resist, particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation”.<sup>189</sup> The tribunal also states that this is the national law in force in many countries.<sup>190</sup> In the proceedings before the Appeals Chamber, the Appeals Chamber found that the circumstances nullified a possible consent, and stated that “such detentions amount to circumstances that were so coercive as to negate any possibility of consent”.<sup>191</sup> The Appeals Chamber concluded “that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible” and thereby dismissed their appeal on the ground of the definition of rape.<sup>192</sup> A possible consent was not given legal effect in this case, because the circumstances made a legally valid consent impossible. The court included the circumstances around the sexual act, and ruled out a

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<sup>186</sup> *Foča*, Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber 22.02.2001, Case No. IT-96-23-T & IT-96-23/1-T; Appeals Chamber 12.06.2002, Case No. IT-96-23 & IT-96-23/1-A. The author’s research has not revealed any court decisions regarding “enforced prostitution” specifically.

<sup>187</sup> They specifically referred to *Akayesu* Prosecutor v. Akayesu, International Criminal Tribunal for Rwanda 02.09.1998, Case No. ICTR-96-4-T, and *Furundžija* Prosecutor v. Anto Furundžija, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber 10.12.1998, Case No. IT-95-17/1-T.

<sup>188</sup> *Foča* for the Trial Chamber, paragraph 442.

<sup>189</sup> *Op. cit.* paragraph 446.

<sup>190</sup> *Op. cit.* paragraph 442.

<sup>191</sup> *Foča* for the Appeals Chamber, paragraph 132.

<sup>192</sup> *Op. cit.* paragraph 133.

possible legally valid consent on basis of these circumstances. What one can draw from this judgement is that, in such situations of vulnerability, a person cannot consent to sexual acts.

### 3.5 Conclusion

This overview of international legal instruments shows that, in many of them, consent has limited legal effect, there are boundaries to the legal effect of consent in the area of sexual acts. There are some interesting differences between them in how they regulate the issue. CEDAW regulates “exploitation of prostitution”, whilst the other instruments regulate “forced prostitution”. The latter instruments focus on the use of force, while CEDAW is broader and includes “exploitation of prostitution”, which comprises more than direct force. An interesting feature is that none of them explicitly regulates the point at which the line between forced and voluntary prostitution is drawn.

## 4. South Africa

### 4.1 Overview of the regulation of prostitution

#### 4.1.1 Introduction

In South Africa prostitution is an immoral act, and the present regulation therefore is based in a moralist tradition. Under the regulation in force, it is a crime both to sell and to buy sexual services, and most of the surrounding activities to prostitution, such as pimping and brothel keeping, are also criminalised. The legal regulation is detailed and regulates many of the acts in separate sections in the Sexual Offences Act and municipal by-laws. South Africa has a hybrid legal system with elements from common and civil law and tribal law. The legal method is characterised by detailed acts, where keywords are defined in the act itself and a mode of interpretation focused on realizing the act's object and purpose. All acts in South Africa are also to be interpreted in a way that best ensures realisation of the principles of the Constitution and the rights enshrined in the Bill of Rights. Because the sale and buying of sexual services is criminalised, the rule of law is important in the interpretation of the act.<sup>193</sup>

The Sexual Offences Act has extra-territorial jurisdiction, meaning that it is applicable also to offences that occurred outside South Africa. Section 61 gives the national courts jurisdiction in cases in which either the victim or the perpetrator has some connection to South Africa, either through citizenship or through being a resident, if the perpetrator was arrested in the territory of South Africa or if the perpetrator is a South African company or a body of persons in South Africa.<sup>194</sup>

The main sections of the regulation of prostitution will be discussed in detail in the following sub-chapters; this introduction will give a brief overview of the regulation of some surrounding activities, such as soliciting for clients and living off the earnings of prostitution.

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<sup>193</sup> See more about the national legal method in chapter 1.5.3.

<sup>194</sup> Sexual Offences Act section 61(1) and (2).

Soliciting is the act of attracting customers for prostitution and is regulated by section 19a). The wording states that “[a]ny person who entices, solicits, or importunes in any public place for immoral purposes, shall be guilty of an offence.” The penalty is up to two years imprisonment and or up to 4000 ZAR in fine.<sup>195</sup> All forms of soliciting require direct physical invitation, the accused has to be physically present in the public place. It is not necessary for the potential client to be aware of the solicitation.<sup>196</sup> The purpose of the solicitation must be to commit an act of sexual nature that, according to contemporary standards of morality, is considered to be immoral. The accused according to this section can be a prostitute or his or her pimp. It can also be used against potential clients, trying to solicit a person for prostitution, which means trying to solicit someone to have sex with him or her for reward.<sup>197</sup> The regulation of soliciting shows that the South African regulation is founded on morals, criminalising the act even when the target, the potential client, was not aware of the solicitation. Soliciting is not criminalised because of the public disturbance or the fact that the act violates someone else’s rights – it is criminalised because of its immorality.

Living on the earnings of prostitution is also criminalised, cf. section 20(1)(a). The penalty is imprisonment for up to three years and or a fine of up to 6000 ZAR, cf. section 22a). The wording of section 20(1)(a) states “any person who knowingly lives wholly or in part on the earnings of prostitution; ... shall be guilty of an offence”. “Earnings” are to be understood as profits or income produced by prostitution. There must be a causal connection between the prostitution and the money. In theory, the wording is broad enough to cover prostitutes living on earnings from their work. However, according to the *S v H* judgement<sup>198</sup> the section is to be understood as only being targeted to others, not the prostitute. The section is directed against others exploiting a prostitute by living on the earnings from his or her prostitution.

Some persons are objectively deemed to be exploiting prostitutes. According to section 21(3), it is presumed that, when someone is “proved to reside in a brothel or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless he or she satisfies the court to the contrary, be deemed to be

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<sup>195</sup> ZAR is South African Rand, the local currency.

<sup>196</sup> *SALRC 2009* p 264-265.

<sup>197</sup> *Op. cit.* p 265-266.

<sup>198</sup> *S v H* 1998 (3) SA 545 AD, Transvaal Province Division of the Supreme Court.

knowingly living wholly or in part on the earnings of prostitution.” This targets pimps and brothel keepers without other income than the income from the prostitution of others. The wording “habitually in the company of a prostitute” also applies to the partners and lovers of the prostitutes, if they cannot convince the court that they are supporting themselves.<sup>199</sup>

This overview shows that the South African regulation is detailed and regulates many of the actions connected with prostitution. The purpose of the law is to suppress prostitution; by making the surrounding actions separate crimes, both on the side of the prostitute and for third persons. The South African law on sexual violence and consent outside the scope of prostitution has evolved, especially after the fall of Apartheid in 1994. For example, marital rape was made a crime with the Sexual Offences Act, section 56(1). According to that section, marital status or any other relationship to the victim is not a valid defence in a case of a rape charge. Before this law reform, sex was seen as one of the duties in a marriage, and sex with the partner was under no circumstances classified as rape. The law reform of 2007 changed this view and no longer saw marriage as consent to sex. There had been an earlier attempt to criminalise marital rape. With a law reform in 1989, the parliament refused to criminalise rape in marriage, but made raping a spouse an aggravating circumstance on convictions for assault.<sup>200</sup> In the following sub-chapters other surrounding activities to prostitution will be discussed, and the recent developments in the South African law on prostitution will be presented.

#### 4.1.2 Buying sexual services

There has been some discussion on when the act of buying sexual services became a crime. It has been argued that a prostitute’s client became criminalised as an accomplice to the prostitutes’ crime in 1988.<sup>201</sup> With the Sexual Offences Amendment Act of 2007, the act of buying sexual services became an independent offence, not linked to the prostitutes’ offence. The criminal act of buying sexual services consists of intentionally engaging the sexual services of a prostitute for reward, regardless of whether or not the

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<sup>199</sup> This can be problematic, in that it obstructs the prostitutes’ chances of having romantic relations. See Høigård and Finstad p 365- 373, especially p 369.

<sup>200</sup> Felicity Kaganas and Christina Murray *Law Reform and the Family, The New South African Rape-in-Marriage Legislation*, Journal of Law and Society, Vol. 18, No. 3 (Autumn 1991), pp 287-302, on p 289.

<sup>201</sup> See the States’ argumentation in the *Jordan* case, paragraph 11 and 45.

act is actually committed.<sup>202</sup> The wording “intentionally” states the necessary degree of guilt: negligence is not enough for it to be an offence. Letter a) of this provision also criminalises attempt. The wording of section 11 corresponds with the content of section 20(1)(1A) regulating the sale of sexual services. The wording of section 11 is more modern, in using the phrase “sexual act”, instead of “unlawful carnal intercourse” and “indecent act”. The wording “sexual act” covers both, and it is irrelevant which kind of prostitution was attempted to be undertaken.

Even though buying sexual services is criminalised both under the Sexual Offences Act and under common law, this is practically not enforced. According to the Parliamentary Committee on Justice and Social Development, it is still mostly the prostitutes who are charged and prosecuted. After the Sexual Offences Act came into force some new arrests were made, but police practice differs between the cities.<sup>203</sup> Buying sexual services is therefore a crime with few, if any, legal consequences in South Africa as of today.

#### 4.1.3 Pimping

The surroundings to prostitution, such as pimping and keeping a brothel are an offence under South African law. These acts were criminalised with the Immorality Act of 1957. Pimping can be done in many ways, and the Sexual Offences Act regulates these separately. Pimping by assisting and receiving money is criminalised in section 20(1)c), and the wording states: “Any person who in public or private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person.” The penalty is up to two years imprisonment and or 4000 ZAR in fine, cf. section 22g).

The section is to be interpreted as covering cases where someone assists by, for example, providing a person, a place or an opportunity for an act of indecency by someone else and for this receives some form of reward. For the offence to be

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<sup>202</sup> Section 11 reads “A person (“A”) who unlawfully and intentionally engages the service of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or a third person (“C”) – a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

b) by committing a sexual act with B,  
is guilty of engaging the sexual services of a person 18 years or older.”

<sup>203</sup> Buyers in Pretoria and Durban have been prosecuted, but there are no known cases from Johannesburg or Cape Town, cf. *SALRC 2009* p 59.



committed, the act of indecency must have taken place. Another act of pimping is the act of pimping by procuring, which is criminalised in section 10. The act of procuring is to provide a prostitute for somebody. In the context of the Sexual Offences Act section 10, it is the obtaining or recruitment of persons for the purposes of them working as prostitutes. In letters a) to e), different ways of procuring are criminalised. The penalty for procuring is up to seven years imprisonment, cf. section 22e). This is more than double the penalty for keeping a brothel.

#### 4.1.4 Brothel keeping

The Sexual Offences Act section 2 criminalises “any person who keeps a brothel”. The penalty is no more than three years in prison and/or no more than 6000 ZAR in fine, cf. section 22a), which is the same penalty as for selling sexual services. In order to be deemed to be keeping a brothel one must have exercised some degree of management, supervision or control of a more or less permanent character. Even persons who are not physically present on the premises can be found to be “keeping” them.

A brothel is defined in section 1 of the Sexual Offences Act as “any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose”. This means that any place that someone keeps or uses for prostitution or any place which a client visits to purchase sexual services is deemed to be a brothel. In the Sexual Offences Act section 3, certain persons are listed who are objectively deemed to be keeping a brothel. This ranges from a person residing in the house in letter a), and the owner of the house in letter e), to the spouse of someone residing in the house in letter g). For someone to be convicted of keeping a brothel, the state must prove that prostitution took place there and that the establishment was kept or used for the purpose of prostitution and that the keeper had mens rea, guilt, which means that he or she knew or at least foresaw that this was a brothel as defined in the Sexual Offences Act.<sup>204</sup>

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<sup>204</sup> SALRC 2009, p 253.

#### 4.1.5 Recent developments of the South African regulation of prostitution

South Africa is in the process of reforming its law on prostitution. An important body in this process is the South African Law Reform Commission, which is an advisory body for the South African Parliament. The South African Law Reform Commission Act established the Commission in 1973.<sup>205</sup> The purpose of the Commission is to do research on existing law and to “make recommendations for the development, improvement, modernization or reform thereof”, cf. section 4. The Commission also has the power to “prepare draft legislation”, based on its research, cf. section 5. The Commission published an issue paper on adult prostitution in 2002.<sup>206</sup> This resulted in the new section 11 of the Sexual Offences Act that criminalises the buying of sexual services. The Commission published a discussion paper on adult prostitution in 2009.<sup>207</sup> The starting point is that forced prostitution is illegal and will remain illegal, as will child prostitution and trafficking. The Commission therefore focuses on voluntary adult prostitution. The national reform will be undertaken within the framework of the South African international responsibilities. South Africa is a state party to many of the international treaties regulating prostitution. These responsibilities are highlighted early in the law reform papers which state that the country wishes to reform its law within the boundaries of the international regulations.<sup>208</sup> The Commission has not made any draft legislation at this stage.<sup>209</sup>

## 4.2 Selling sexual services

### 4.2.1 Interpretation of the section criminalising the sale of sexual services

The South African regulation stands out in that the act of prostitution can be undertaken in more than one way, not just intercourse for reward is criminalised, but acts of indecency are included as well. This broad scope of application once again shows that the South African regulation is founded on the moralist tradition. The main questions arising in the interpretation are, firstly, how the wording in general is to be interpreted and, secondly, where the line is to be drawn between criminal prostitution and other sexual relationships.

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<sup>205</sup> Act 19 of 1973.

<sup>206</sup> South African Law Reform Commission, Issue Paper 19, Project 107, *Sexual Offences: Adult prostitution*, Pretoria 2002.

<sup>207</sup> SALRC 2009.

<sup>208</sup> *Op. cit.* p 1 and 5.

<sup>209</sup> *Op. cit.* p 226.

The act of selling sexual services was criminalised in 1988, with the Immorality Amendment Act.<sup>210</sup> The Act was later reformed and renamed the Sexual Offences Act, and section 20(1)(1A) criminalises the act of selling sexual services. The wording states “any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency with any other person for reward ... shall be guilty of an offence.” The crime of prostitution can be committed in two ways, either by having “unlawful carnal intercourse or [committing] an act of indecency ... for reward”.

The first question is how “unlawful carnal intercourse” is to be interpreted. The wording “carnal” implies that the intercourse is of a sexual nature.<sup>211</sup> The natural meaning of the wording “intercourse” is penetration with means of the sexual organs or the genitals. After the *National Coalition* case is it to be understood to include vaginal and anal intercourse.<sup>212</sup> With the wording “unlawful” the act states that this sexual encounter has to be of a non-lawful nature, and according the case law, it is to be interpreted as intercourse other than between husband and wife.<sup>213</sup> After the *Jordan* case, the section is to be interpreted gender neutral, covering male and female prostitutes, and including heterosexual and homosexual acts.<sup>214</sup> According to this, the wording “unlawful carnal intercourse” is to be interpreted as sexual penetration of either vaginal or anal nature by persons that are not married to one another.

The next question is how the wording “act of indecency” is to be interpreted. The natural meaning of the wording is an act that is not decent, meaning that it does not adhere to the moral standard of decency. The word “indecency” means behaviour that is morally or sexually offensive.<sup>215</sup> The kind of acts that are to be included must, according to the context, be limited to sexual acts. The wording is not defined in the Act, but according to the case law is “[s]omething ... indecent if it offends against recognised standards of decency. The applicable standards are those of the ordinary reasonable member of

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<sup>210</sup> Immorality Amendment Act 2 of 1988.

<sup>211</sup> *Oxford Advanced Learners Dictionary* “carnal”: “connected with the body or with sex”.

<sup>212</sup> *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR (CC) and SALRC 2009 p 15.

<sup>213</sup> Sexual Offences Act, section 1, definitions.

<sup>214</sup> *Jordan*, paragraph 9.

<sup>215</sup> *Oxford Advanced Learners Dictionary* under “indecency”.

contemporary society”.<sup>216</sup> The act must therefore be immoral in the view of the common moral at the time it occurs. The context within the section, with intercourse regulated in letter a), implies that the acts included in “act of indecency” goes from acts on the verge of intercourse on the one side, to less intense sexual acts on the other side. An “act of indecency” is, according to case law, not limited to acts that would normally lead to intercourse, it also applies to acts that do not lead or amount to intercourse.<sup>217</sup> In summary, the wording “act of indecency” is to be understood as comprising morally offensive sexual acts.

Common for both of the acts is that they must have been carried out “for reward”. The natural meaning of “for reward” in its context is that the act was undertaken on the condition that one would be getting something in return for the act. The word “reward” includes anything that one can receive as compensation for the undertaken act. According to the South African Law Reform Commission, “for reward” is to be interpreted as monetary and any other compensation with pecuniary value, such as clothing, food, and accommodation.<sup>218</sup> In summary, the acts that are undertaken “for reward” are to be interpreted as being carried out on the condition that a compensation of some kind of pecuniary value will be received in return.

Another common element is the fact that the actions covered by the provision are those undertaken with “any person”. The natural meaning of the wording would be broad enough to cover exchanging gifts for sex between lovers. That was not intended, and the wording should be interpreted restrictively to cover that which one normally understands as prostitution.<sup>219</sup> The acts are to be distinguished on the fact that prostitution is undertaken on the condition of receiving compensation, whilst other sexual relationships are undertaken more for the sake of the relationship itself, and the gifts are more of a coincidental bonus.

In summary, the crime of prostitution comprises sexual acts that are performed on the condition of receiving some form of compensation. The penalty for prostitution is up to three years imprisonment and or up to 6000 ZAR in fine cf. section 22 of the Sexual

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<sup>216</sup> *SALRC 2009* p 15 with references to case law.

<sup>217</sup> *Ibid.*

<sup>218</sup> *SALRC 2009*, p 10 and 16.

<sup>219</sup> *Jordan*, paragraph 48.

Offences Act. This is the same as for keeping a brothel, and more than for the act of pimping by assisting.

#### 4.2.2 Enforcement of the section criminalising the sale of sexual services

The Sexual Offences Act is not as much in use as could be expected. When prostitutes get arrested, it is mostly on the grounds of violations of municipal by-laws directed for example against loitering, and not the Sexual Offences Act.<sup>220</sup> There is therefore little case law regarding this act. Another aspect of the enforcement is that the prostitutes are subject to police harassment. In the *SWEAT* judgement prostitutes took the police to court for harassing them. They claimed that the police had arrested them without the purpose of prosecuting them; they were arrested and later released without being charged. The prostitutes obtained an interdict from the Western Cape High Court that restrained the local police from arrests without prosecution.<sup>221</sup> This shows that the Sexual Offences Act is an act that is not used as intended. The reasons for this lie partly in the nature of the offence, as it is difficult to prove. The police would need to entrap the prostitutes to produce evidence for violations of section 20(1)(1A). This requires significant monetary and personnel resources. It is much easier and less resource demanding to prosecute on violations of the municipal by-laws.

### 4.3 Regulation of the legal effect of consent to the sale of sexual services

#### 4.3.1 Consent in relation to voluntary prostitution

The criminal law regulation of prostitution in South Africa does not distinguish between voluntary and forced prostitution, except in the case of trafficking, child prostitution and mentally disabled prostitutes – see more about these situations later in this chapter. For other persons selling sexual services there is no provision in the act that asks whether the sale was voluntary or not. It is a criminal offence in terms of the Sexual Offences Act whether conducted voluntarily or not. The presence or lack of consent therefore has no legal effect. The regulation presumes that they are selling sexual services voluntarily, and have thereby shown the adequate amount of guilt for the act to be an offence. In a case of forced prostitution the case may be acquitted before a court on the basis of lack

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<sup>220</sup> Gould p 5 and Nicolé Fick *Policing Sex Workers – A violation of rights?* Cape Town 2006, p 8.

<sup>221</sup> See *SWEAT The Case Sex Worker Education And Task force v The Minister of Safety and Security and Others*, Western Cape High Court, 20.04.2009.

of guilt on the side of the prostitute, based on the general principles of guilt in common law, but there are no indications in the Sexual Offences Act on how such a situation is to be regulated.

#### 4.3.2 Consent in relation to trafficking

South Africa is a State Party to the Palermo protocol and is in the process of developing a national act regulation trafficking.<sup>222</sup> With the Sexual Offences Act of 2007, the country enacted transitional provisions regulating trafficking. Section 71 criminalises trafficking in persons for sexual purposes. “Trafficking” means any form of participation in the transportation of someone into or out of South Africa for sexual purposes, without the consent of the trafficked person.<sup>223</sup> Both direct and indirect involvements in trafficking are criminalised.<sup>224</sup> The definition is similar to the definition in the Palermo Protocol, but has an important distinction: it does only criminalise trafficking across the national border of South Africa. Crossing a national border is no criterion according to the Palermo Protocol. The ways in which one can participate in the transportation include “the supply, the recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale disposal or receiving of a person”.<sup>225</sup>

Consent is the deciding factor in evaluating whether an act constitutes trafficking or not, and legally relevant consent is regulated in detail in section 71. The wording “consent” is to be interpreted as “voluntary or uncoerced agreement”, and there are situations where a possible consent from the victim of trafficking will not be legally relevant. These include, but are not limited to, cases in which the victim of trafficking is not legally capable of consenting, including where the victim is “asleep; unconscious; in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that ... the consciousness or judgement is adversely

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<sup>222</sup> SALRC 2009 p 273. See also South African Law Reform Commission, Discussion Paper 111, Project 131 *Trafficking in Persons*, Pretoria 2006, which includes a Draft Bill.

<sup>223</sup> Section 71(1) which reads “A person (A) who trafficks any person (B) without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.”

<sup>224</sup> Section 71(2) which reads “A person who (a) orders, commands, organises, supervises, controls or directs trafficking; (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause or bring about, promote, perform, contribute towards or participate in trafficking, is guilty of an offence of involvement in trafficking in persons for sexual purposes.”

<sup>225</sup> See the definition of trafficking in section 70(2)(b).

affected; a child below the age of 12; or a person who is mentally disabled”,<sup>226</sup> or if any of the means listed in the definition of trafficking has been used or is present.<sup>227</sup> These means are “threat of harm; the threat or use of force, intimidation or other forms of coercion; abduction; fraud; deception or false pretences; the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such act; or the giving or receiving of payments, compensation, rewards, benefits or any other advantage”.<sup>228</sup>

Here, consent has two main sides, the mental or legal capability for the person in question to be consenting in general, and the specific circumstances of the situation in which this consent was made. Both of these sides are objectively and explicitly regulated in the act. Where a person is capable of consenting, this consent will still not be legally valid, if given under the listed circumstances. The definition of consent goes further here than the Palermo Protocol, by the fact that circumstances making consent invalid are not limited to the ones listed in the act. This means that a court is free to determine whether other circumstances would also make a possible consent invalid or not legally relevant.

The legal effect of lack of consent is that the act then becomes an offence, where the perpetrator can be prosecuted and punished. Lack of consent also has a legal effect for the person in question. Victims of trafficking are not legally responsible for committing any offences. According to section 71(5), a victim of trafficking is “not liable to stand trial for any criminal offence”. So even though they objectively have committed the crime of prostitution, they are not liable according to criminal law, because of the lack of subjective guilt. Consent thereby has the legal effect of being the decisive factor, determining whether the act is a criminal offence perpetrated by the prostitute (prostitution) or a criminal offence perpetrated against the prostitute (trafficking).

#### **4.3.3 Consent in relation to child prostitution**

Child prostitution is defined as where a person below the age of 18 is selling sexual services. Until the Sexual Offences Act of 2007, this was a criminal offence, regulated in

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<sup>226</sup> Section 71(4)(b).

<sup>227</sup> Section 71(4)(a).

<sup>228</sup> Section 70(2)(b), (i)-(vii).

the same way as adult prostitution. With the law reform of 2007 child prostitution was decriminalised, meaning that children selling sexual services are no longer committing an offence, and cannot be prosecuted and punished for their act. Buying the sexual services of a person below 18 years of age is regulated in the Sexual Offences Act section 17. The wording is similar to the wording of buying the sexual services of an adult, but differs in that the act is an offence “with or without the consent” of the child. Attempted buying of sexual services is also criminalised. This is similar to the regulation of adult prostitution.

According to this law reform, a minor’s consent to the sale of sexual services is not legally relevant. Where a person below 18 years of age sells sexual services, this is deemed as a violation of the rights of the minor, irrelevant of the opinion of the person in question. The distinction is made based on an objective measure, which is the age of the person. Subjective circumstances, such as exceptional maturity, are not legally relevant. Minors are not given the legal capacity of consenting to such acts.

#### **4.3.4 Consent in relation to mentally disabled prostitutes**

Buying the sexual services of a person who is mentally disabled is criminalised in section 23(1). The wording is similar to the wording in section 11 and 17, the difference being that the victim in question is a person who is mentally disabled. Here, consent is not given any legal effect, the act states in section 57(2) that a mentally disabled person is “incapable of consenting to a sexual act”. From that one can draw the conclusion that the person who is mentally disabled cannot be prosecuted for selling sexual services. This is based on the lack of valid consent, and thereby the lack of guilt.

#### **4.3.5 Conclusion on the legal effect of consent in relation to prostitution**

Based on the aforesaid, one can see that South African law limits the scope of persons and situations where a genuine consent can be made, and removes them from the scope of application of section 20(1)(1A) of the Sexual Offences Act. For these persons and situations, the objective act of prostitution is not an offence, because of legal limitations which are objectively regulated. Outside these situations consent is not asked for in the act, it is taken for granted. There has not been a case before the courts where the question was how to judge a situation of forced prostitution, and it is not clear that the



prostitute in such a situation would be found criminally liable. The interesting thing here is that forced prostitution is not regulated in the Sexual Offences Act, and that the legislator has not given any indication on how such a situation was intended to be regulated.

#### **4.3.6 Introduction to the regulation of consent in other areas of law**

Consent is an important factor in many other areas of the South African law, such as, for example, medical experiments and other forms of bodily harm. The regulation in these fields is not directly relevant for the question of consent to the sale of sexual services. However, it is used here to show that consent is limited in many fields and for many reasons. The personal capacity of consenting is regulated differently, depending on objective factors, such as the situation or the act in question, and subjective factors like the person in question. This systematic overview of consent is used here to support the argument that consent can be restricted and limited, also when it comes to the sale of sexual services.

#### **4.3.7 Consent in relation to medical experiments**

Participation in medical experiments is regulated in the Constitution and in the National Health Act of 2004. In section 12(2) of the Constitution, everyone is granted the “right to bodily and psychological integrity”. This includes the right “not to be subjected to medical or scientific experiments without their informed consent.”<sup>229</sup> This is regulated in more detail in the National Health Act. According to the preamble of the National Health Act, the act must be interpreted in light of the Constitution.<sup>230</sup> The preamble also refers to the duty to “respect, protect, promote and fulfil the rights enshrined in the Bill of Rights”, which implies that the act must be interpreted so that it fulfils this duty.<sup>231</sup> The preamble thus creates a connection between human dignity as an interpreting value in the Constitution and medical experiments. This indicates that human dignity is a guiding principle for the distinction between legal and illegal medical experiments.

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<sup>229</sup> Section 12(2)(c).

<sup>230</sup> See the National Health Act, preamble, paragraph 2, 3 and 4.

<sup>231</sup> National Health Act, preamble, paragraph 4.

Section 11 regulates health services for experimental or research purposes. According to section 11(1), the health practitioner has a duty to inform the patient, and section 11(2) requires the written authorisation from the patient, the patient's primary health care provider, the head of the health care establishment and the medical research ethics committee. From this section, one can see that it is not enough that the patient himself or herself consents; there is the need for consent from a range of medical practitioners as well. By requiring the consent of the practitioner and the head of the health establishment, one is trying to secure that the experiment is justifiable under medical research standards in this case, with this practitioner and this patient. This shows how limited personal autonomy is in relation to consenting to medical experiments. It is not enough to have just personal consent; personal consent is only one of many factors making the experiment possible. Personal autonomy must be weighed against fundamental principles of medical ethics, and if the ethical standards are not met, personal consent is not important enough to respect. If the experiment is unethical, personal consent has no effect, and will not be respected at all.

Medical research and experiments are also regulated in section 71, specifically regulating research on, or experimentation with, human subjects. Research or experimentation on a living adult person may only be carried out in "a prescribed manner", cf. section 71(1)(a), and with the "written informed consent of the patient", cf. section 71(1)(b). Based on legal systematics and the link to the Constitution, one can presume that "prescribed manner" refers to the medical-ethical rules for such experiments, ensuring that the procedure is medically and ethically justifiable. For minors, the areas to which they can consent are limited, even if all relevant persons consent. An important principle here is that no minor shall be subjected to experimentation that could have been performed on an adult.<sup>232</sup>

In summary, consent to medical experiments is limited both on the side of the person and in regard to what kind of experiments one can consent to. The person must be adequately informed in order to make a valid consent, and the scope of experiments one can consent to is limited by ethical and medical principles. There is no unlimited right to decide for oneself what kind of medical experiments one wishes to participate in. On the

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<sup>232</sup> National Health Act, section 71(3)(b)i).

other hand, when it comes to therapeutic medical treatment, consent may be given legal effect.<sup>233</sup> The difference here is that such treatment is no experiment; it is undertaken for therapeutic reasons. The difference between consenting to experiments and therapeutic treatment will, in practical life, not be very large, because of the strict criteria for either therapeutic effect or medical ethics standards.

#### 4.3.8 Consent in relation to bodily harm

An important principle regarding consent in relation to South African criminal law is the principle *volenti non fit injuria* (an injury is not done to one who consents). This applies to a limited extent in criminal law. Consent will not be given legal effect in the case of murder. The reasoning behind this is the state's interest in the protection of life. When it comes to assault, consent can be given the legal effect of impunity, when the bodily harm is applied in the context of, for example, lawful sporting activities.<sup>234</sup> It is not absolutely clear where the line is to be drawn, and the courts in South Africa have not yet explicitly provided a distinction. The important issue here is that there is a limitation on the possibility of consent to bodily harm. The personal autonomy is not unlimited; there are objective boundaries for the legal effect given to consent. The line is drawn based on a weighing between the respect for the personal autonomy and the need to protect life.

#### 4.3.9 Conclusion on consent in South African law

As one can see from the sub-chapters above, consent is limited in many respects in South African law. Personal autonomy, represented here by the expression of consent, is not an issue that is to be respected in every situation and to any extent in South African law. It is in many instances limited, based on different ideas of the protection of the person in question, and human dignity in general.

### 4.4 Conclusion

This chapter has given an overview of the South African regulation of prostitution and especially the legal effect of consent to the sale of sexual services. As shown, both prostitution and most connected activities are criminalised, and consent is not given a

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<sup>233</sup> C.G van der Merwe and Jacques E. du Plessis (eds.) *Introduction to the Law of South Africa*, The Hague 2004, p 454.

<sup>234</sup> *Ibid.*

major legal effect. The area where consent is given the largest influence is in the distinction between prostitution and trafficking. In other areas of the law, consent is given legal effect, but the conditions for a legally relevant consent are relatively strict, and thereby limit the practical effect of consent.

The South African regulation of prostitution is morally founded, which is shown in the wording and the scope of application of the regulation. This chapter has shown how detailed, coherent and systematic the South African regulation is, and the influence from the common law system makes itself visible in the way the acts are formed.

The strict regulation of prostitution places South Africa on the one outer edge of the three countries compared in this thesis. The following chapter will show that the regulation in Germany places itself on the other outer edge.

## 5. Germany

### 5.1 Overview of the regulation of prostitution

#### 5.1.1 Introduction

In Germany, both the sale and the buying of sexual services are legal actions. According to the law reform of 2002, the contract between the prostitute and the buyer is legally valid. The former regulation was also such that both acts were legal, but the contract regarding the sale of sexual services was deemed as immoral and therefore not enforceable before the courts. The difference is that now the contract regarding the sale of sexual services is no longer deemed to be immoral. The contract is now legally valid and enforceable before the courts. Before the change, a prostitute could not claim the agreed reward before a court, because the agreement regarding sexual services was immoral and therefore regarded as null and void under German law. With this shift in regulation, Germany changed from a moral tradition to a pragmatic regulation of prostitution. The buyers are not mentioned in the German regulation of prostitution. The act of buying sexual services is legal, and does not need any legal regulation.

The German legal system is based on the civil law tradition, with a strong focus on law making. Acts are the most important legal sources, and the German legal method is focused on a hermeneutic interpretation of the wording. The German regulation of prostitution is divided into legal and illegal prostitution. For criminalised prostitution, the rule of law is important for the interpretation.<sup>235</sup>

This chapter presents an overview of the German regulation of prostitution, and deals with the surroundings to prostitution. Brothel keeping and pimping as such is legal, within limitations. The German Criminal Code criminalises in the sections 180a and 181a the exploitation of prostitutes and the act of controlling prostitution.

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<sup>235</sup> For more about the national legal method, see chapter 1.5.3.

### 5.1.2 Exploitation of prostitutes – brothel keeping and similar activities

The title of section 180a is exploitation of prostitutes, and the section criminalises exploitation through brothel keeping and similar activities.<sup>236</sup> Section 180a(1) criminalises a person who, on a “commercial basis maintains or manages an operation in which persons engage in prostitution and in which they are held in personal or financial dependency”.<sup>237</sup> The section is aimed at brothel keepers and pimps who are exploiting prostitutes. Section 180a(2), number 2 criminalises a person who “urges another person to whom he has furnished a dwelling for the exercise of prostitution to engage in prostitution or exploits the person in that respect.”<sup>238</sup> The German wording uses the word “Wohnung” which can be translated with “apartment”, and the section is to be understood as to apply to someone who has given the prostitute a place to stay for the purpose of prostitution and, in connection with that, promotes the other person’s prostitution or exploits his or her prostitution.

### 5.1.3 Controlling someone else’s prostitution - pimping

The illegal forms of pimping are regulated by section 181a. This section criminalises persons who control someone else’s prostitution. Subsection (1) criminalises in number 1 anyone who “exploits another person who engages in prostitution”.<sup>239</sup> The wording here is broad and covers any form of exploitation of a prostitute. Number 2 criminalises a more specific form of exploitation – the control over someone else’s prostitution – and is similar to that which, in the other countries, is called pimping. The wording criminalises a person who “for his own material benefit supervises another person’s engagement in prostitution, determines the place, time, extent or other circumstances of the engagement in prostitution, or takes measures to prevent the person from giving up prostitution, and for that purpose maintains a general relationship with the person

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<sup>236</sup> German title “Ausbeutung von Prostituierten”.

<sup>237</sup> Official English translation from the Ministry of Justice, found at [http://www.gesetze-im-internet.de/englisch\\_stgb/index.html](http://www.gesetze-im-internet.de/englisch_stgb/index.html), pr 31.05.2011. German wording: “Wer gewerbsmäßig einen Betrieb unterhält oder leitet, in dem Personen der Prostitution nachgehen und in dem diese in persönlicher oder wirtschaftlicher Abhängigkeit gehalten werden, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft”.

<sup>238</sup> Official English translation from the Ministry of Justice. German wording: “Ebenso wird bestraft, wer eine andere Person, der er zur Ausübung der Prostitution Wohnung gewährt, zur Prostitution anhält oder im Hinblick auf sie ausbeutet”.

<sup>239</sup> Official English translation from the Ministry of Justice. German wording: “Mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren wird bestraft, wer eine andere Person, die der Prostitution nachgeht, ausbeutet”.

beyond a particular occasion”.<sup>240</sup> This section can be violated in two ways; either by controlling how the prostitution is undertaken, or by making sure that a prostitute stays in prostitution. Common for both forms of violation is that it must be carried out for the material benefit of the pimp, it must have been done with the intention of obtaining a personal profit from the prostitution of the other, and the pimp must for that purpose have contact with the prostitute over some time, a single incident is not enough to have violated section 181a(1) number 2.

A broader criminalisation of pimping is regulated in the second subsection. Section 181a(2) criminalises a person who “impairs another person’s personal or financial independence by promoting that person’s engagement in prostitution, by procuring sexual relations on a commercial basis, and for that purpose maintains a general relationship with the person beyond a particular occasion”.<sup>241</sup> The punishment is imprisonment not exceeding three years or a fine.<sup>242</sup> The criminal act here is to make someone prostitute himself or herself by arranging for their prostitution. In addition to providing prostitutes for clients, the pimp must be limiting the prostitutes’ personal or financial freedom. And the pimp must for this purpose have a relationship with the prostitute over some time. A single incident is not enough to be violating section 181a(2).

Sections 180a(2) and 181a(2) number 2 are similar, but there are significant differences. In 181a(2) number 2, exploitation of prostitution in connection with what one could call pimping is criminalised, whereas in section 180a(2) number 2, only the exploitation in connection with brothel-like conditions is criminalised. The sections also distinguish with regard to the length of punishment. Section 180a(2) number 2 has up to three years imprisonment or a fine, whilst section 181a(1) number 1 and 2, provides for imprisonment from six months to five years. The purpose of the two rules is to ensure

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<sup>240</sup> Official English translation from the Ministry of Justice. German wording: “Mit Freiheitsstrafe von sechs Monaten bis zu fünf Jahren wird bestraft, wer seines Vermögensvorteils wegen eine andere Person bei der Ausübung der Prostitution überwacht, Ort, Zeit, Ausmaß oder andere Umstände der Prostitutionsausübung bestimmt oder Maßnahmen trifft, die sie davon abhalten sollen, die Prostitution aufzugeben, und im Hinblick darauf Beziehungen zu ihr unterhält, die über den Einzelfall hinausgehen”.

<sup>241</sup> Official English translation from the Ministry of Justice. German wording: “Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer die persönliche oder wirtschaftliche Unabhängigkeit einer anderen Person dadurch beeinträchtigt, dass er gewerbsmäßig die Prostitutionsausübung der anderen Person durch Vermittlung sexuellen Verkehrs fördert und im Hinblick darauf Beziehungen zu ihr unterhält, die über den Einzelfall hinausgehen”.

<sup>242</sup> Section 181a(2).

that the prostitute can make voluntary decisions, by criminalising acts that can constitute force.

Being married to a prostitute does not free the pimp of punishment for pimping and exploiting a prostitute. The German Criminal Code specifically states in section 181a(3) that, where a spouse is acting as a pimp in the meaning of section 181a(1) or (2) for his or her spouse, the pimp shall be liable to the same penalty as regulated in (1) and (2).<sup>243</sup> This might look strange, but seen in connection with the fact that rape in marriage was first criminalised in 1997 the specification is not that surprising. With a law reform adopted on 15.05.1997, section 177 of the Criminal Code included a criminalisation of marital rape. The section came into force on 05.07.1997,<sup>244</sup> which is very late compared to other European countries. Before the reform, it was not a criminal act to rape one's spouse; sex was deemed as one of the duties of a marriage. Seen in this context, it is not that surprising that the regulation of criminal pimping includes a separate section stating that this is a criminal offence also when perpetrated by a spouse.

#### 5.1.4 Recent developments in German law on prostitution

The Prostitution Act was evaluated in 2007, and the German Parliament concluded that the Act fulfils its goals and purposes only to a limited extent. Regardless of the negative result of the evaluation, the Act was not repealed. The act of pimping a prostitute under force was criminalised in 2005, two years before the evaluation, and is now regulated in section 232 of the Criminal Code.<sup>245</sup> The evaluation process sparked a reform for the protection of minors from sexual abuse, by changing the age of protection to persons under the age of 18 years, instead of under the age of 16 years in section 182(1) number 1 and 2 of the Criminal Code. This section does not focus on sexual acts for reward; the criminal act lies in taking advantage of an exploitative situation for the purpose of sex.

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<sup>243</sup> German wording: "Nach den Absätzen 1 und 2 wird auch bestraft, wer die in Absatz 1 Nr. 1 und 2 genannten Handlungen oder die in Absatz 2 bezeichnete Förderung gegenüber seinem Ehegatten vornimmt".

<sup>244</sup> See Bundestagsgesetzblatt Jahrgang 1997, Teil I Nr 45, p 1607-1608.

<sup>245</sup> Cf. 37. Strafrechtsänderungsgesetz of 11.02.2005, came into force 19.02.2005.



## 5.2 Selling sexual services

### 5.2.1 Introduction

The act of selling sexual services is legal in Germany, and is regulated in the Prostitution Act. The Act is not a part of criminal law; it is an act regulating the contract regarding the sale of sexual services. In addition to this the Criminal Code contains sections regulating unlawful prostitution.

### 5.2.2 Legal prostitution

The Prostitution Act has three sections, regulating legal prostitution. Section 1 states that, where sexual actions have been undertaken against a previously agreed reward, this agreement forms a legally enforceable claim. The same is applicable where someone, particularly in the framework of a professional relation, has kept himself or herself ready for the undertaking of the sale of sexual services against a previously agreed reward.<sup>246</sup> This applies to cases where someone is working in a brothel or a similar place, and states that the work contract between the brothel keeper and the prostitute is legally valid.

Section 2 regulates the enforcement of the claim resulting from the contract on the sale of sexual services. The first sentence states that only the prostitute personally can enforce the claim, no one else can claim the reward.<sup>247</sup> The second and third sentence regulates the relevant objections to the claim. It is only the complete or partial non-fulfilment that can be used as an objection to the claim. For a contract regarding prostitution outside of a brothel only the complete non-fulfilment of the contract is a relevant objection; within a brothel the partial non-fulfilment is also relevant, as long as it relates to disputes on the agreed time for the undertaking of the service.<sup>248</sup> This would apply in cases where the prostitute did not stay in the brothel for the agreed amount of time. Vindication is a relevant objection, and also that the reward already has been paid,

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<sup>246</sup> German wording: "Sind sexuelle Handlungen gegen ein vorher vereinbartes Entgelt vorgenommen worden, so begründet diese Vereinbarung eine rechtswirksame Forderung. Das Gleiche gilt, wenn sich eine Person, insbesondere im Rahmen eines Beschäftigungsverhältnisses, für die Erbringung derartiger Handlungen gegen ein vorher vereinbartes Entgelt für eine bestimmte Zeitdauer bereithält".

<sup>247</sup> German wording: "Die Forderung kann nicht abgetreten und nur im eigenen Namen geltend gemacht werden."

<sup>248</sup> German wording: "Gegen eine Forderung gemäß § 1 Satz 1 kann nur die vollständige, gegen eine Forderung nach § 1 Satz 2 auch die teilweise Nichterfüllung, soweit sie die vereinbarte Zeitdauer betrifft, eingewendet werden".

as regulated in section 362 of the BGB.<sup>249</sup> Other objections, such as the quality of the service, are not legally relevant.

The third section regulates the employers' authority over the employed prostitutes.<sup>250</sup> Their authority is limited in comparison to other occupations, and the employer does not, for example, have the right to decide to which clients the prostitute is to sell his or her sexual services. The section states that the fact that an employer only has limited authority does not prevent the prostitute from being employed in the sense of social law. A prostitute still has the rights as an employee according to social law, even though he or she is working with more freedom than other employees. This limited authority is another example of trying to ensure that prostitutes can make voluntary choices. It is done here by making sure that a pimp cannot hide behind the status of employer.

### 5.2.3 Criminal prostitution

The Criminal Code criminalises some forms of prostitution, these are unlawful prostitution and prostitution which is likely to corrupt juveniles. Section 184e criminalises persons who conduct prostitution in areas or at times where prostitution is not allowed. The wording states "Whosoever persistently contravenes a prohibition enacted by ordinance against engaging in prostitution in particular places at all or during particular times of the day, shall be liable to imprisonment of not more than six months or a fine of not more than one hundred and eighty daily units".<sup>251</sup> To violate this section, the prostitute must have conducted such unlawful prostitution on several occasions, cf. the wording "persistently". The unlawful areas and times are regulated in the law of the states and not on national level, and can therefore differ from state to state.

Prostitution that is likely to corrupt juveniles is criminalised in section 184f. The section regulates prostitution that is conducted in areas where persons under 18 years are

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<sup>249</sup> German wording: "Mit Ausnahme des Erfüllungseinwandes gemäß des § 362 des Bürgerlichen Gesetzbuchs und der Einrede der Verjährung sind weitere Einwendungen und Einreden ausgeschlossen".

<sup>250</sup> German wording: "Bei Prostituierten steht das eingeschränkte Weisungsrecht im Rahmen einer abhängigen Tätigkeit der Annahme einer Beschäftigung im Sinne des Sozialversicherungsrechts nicht entgegen".

<sup>251</sup> Official English translation from the Ministry of Justice. German wording: "Wer einem durch Rechtsverordnung erlassenen Verbot, der Prostitution an bestimmten Orten überhaupt oder zu bestimmten Tageszeiten nachzugehen, beharrlich zuwiderhandelt, wird mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu einhundertachtzig Tagessätzen bestraft".

meant to be, such as schools or kindergartens, or in a house where persons under 18 years of age live, conducted in a manner that can corrupt juveniles.<sup>252</sup> The section does not criminalise prostitution per se in such areas, only the performance of prostitution that can corrupt the minors' morality. It is not evident from the wording what the difference between these forms of prostitution is intended to be. A possible meaning can be that prostitution which the juveniles can see and which in other forms does affect them is considered to be illegal prostitution in this sense. Situations of discreet prostitution on the other hand, can be outside the scope of application of section 184f. This may be the case where there are no public indications that prostitution is happening, and therefore nothing that can affect and corrupt the juveniles.

#### 5.2.4 Enforcement of the act by police and courts

With the new regulation, prostitutes can now sue clients who refuse to pay, they can sign work contracts as prostitutes, get social and medical insurance and financial aid when unemployed. The possibility of claiming the agreed payment before the courts has not been used much. Most of the prostitutes are not using this possibility, according to the SoFFI-report.<sup>253</sup> This is a report from the Sozialwissenschaftliches FrauenForschungsInstitut an der Evangelischen Fachhochschule Freiburg, a social science research institute. The survey was undertaken between 2004 and 2005, on the request of the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth. Of the courts surveyed in this report, none had decided in civil law proceedings against clients of prostitutes.<sup>254</sup> Only four of the responding prostitutes in the study stated that they had started legal proceedings to get their money.<sup>255</sup> Many of the prostitutes (63%) were positive about using the courts in the future, if they have to.<sup>256</sup> The German

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<sup>252</sup> German wording: "Wer der Prostitution

1. in der Nähe einer Schule oder anderen Örtlichkeit, die zum Besuch durch Personen unter achtzehn Jahren bestimmt ist, oder

2. in einem Haus, in dem Personen unter achtzehn Jahren wohnen, in einer Weise nachgeht, die diese Personen sittlich gefährdet, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft".

<sup>253</sup> Sozialwissenschaftliches FrauenForschungsInstitut an der Evangelischen Fachhochschule Freiburg SoFFI, Report *The Act Regulating the Legal Situation of Prostitutes – implementation, impact, current developments*, p 21.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

officials are of the opinion that the possibility of taking the clients to court has empowered the prostitutes.<sup>257</sup>

Few of the prostitutes have signed work contracts as prostitutes. In the aforementioned SoFFI-report, only three of the respondents had a work contract as prostitutes.<sup>258</sup> There are many reasons why the prostitutes do not want to sign work contracts as prostitutes. Mostly, they fear that they will lose their sexual independency, and the freedom to choose working hours and workplace. Other reasons are that many do not want to pay tax on their income, and others prefer to work independently.<sup>259</sup> Many of the brothel owners do not want to sign contracts with their prostitute employees, because they do not want to accept the limited right to give directions.<sup>260</sup>

The results from the study undertaken to provide information for the SoFFI-report was also reported in a German version, named the Kavemann Report. A chapter in this report studied the effect of the new regulation on exiting prostitution. In this chapter the authors studied the motivations for leaving prostitution and obstacles that the prostitutes encountered in trying to exit. Many stated that they wanted to leave because the working conditions and the competition from other prostitutes had become harder.<sup>261</sup> According to the Kavemann Report, the Prostitution Act has neither promoted exit nor has it made it more difficult to leave prostitution. The new regulation has not affected the question of exiting either positively or negatively.<sup>262</sup>

### 5.2.5 Insight gained by the evaluation of the Prostitution Act

When looking at the evaluation of the Prostitution Act, it is clear that there is still potential for improvement when it comes to reaching the goals behind the act.<sup>263</sup> The aim of providing the prostitutes with legal instruments to obtain their payment has not

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<sup>257</sup> Bundesministerium für Familie, Senioren, Frauen und Jugend, Bericht der Bundesregierung zu den Auswirkungen des Gesetzes zur Regelung der Rechtsverhältnisse der Prostituierten, Berlin 2007, p 12, (hereinafter referred to as *BMFSFJ 2007*).

<sup>258</sup> SoFFI Report p 17.

<sup>259</sup> SoFFI Report p 18.

<sup>260</sup> *BMFSFJ 2007* p 16.

<sup>261</sup> Barbara Kavemann, Heike Rabe and Claudia Fischer Vertiefung spezifischer Fragestellungen zu der Auswirkungen des Prostitutionsgesetzes – Ausstieg aus der Prostitution, Kriminalitätsbekämpfung und Prostitutionsgesetz, Berlin 2007, p 29.

<sup>262</sup> *Op. cit.* p 40.

<sup>263</sup> See *BMFSFJ 2007*.

reached its goal yet, because the prostitutes are not using this option. It is questionable how efficient such a measure can be, taking into account that there is a widespread practice to claim the money up front, and, if a client refuses to pay, the prostitute refuses to deliver the service. If that is the case, it is not surprising that the claims are not enforced through the courts, as they are immediately fulfilled at the time they come into existence.

The aim of organising the exercise of voluntary prostitution through work contracts does not reach its goal either. Most of the prostitutes do not have such contracts, and even if they have them, the brothel owner is entitled to decide the content of the contract to such a great extent that there is little room for the prostitutes' own will. Because so few have signed contracts, they are still not covered by the social services system. The rights that they can be granted – medical and social insurance, and financial aid when unemployed – are all dependent on a work contract. Another aim was to make the prostitutes less vulnerable by giving them legally protected rights. Many of the prostitutes have other challenges as well, for example drug addiction and lack of legal residence in Germany. These groups will continue to be vulnerable because they are still exercising criminal activities. The legal aims of providing better conditions for the prostitutes through the Prostitution Act have not been fulfilled. A major reason for this is that the conditions of making use of the measures are not suitable to the situation the prostitutes are in.

#### **5.2.6 Conclusion on the sale of sexual services**

The German regulation of the sale of sexual services is that it is mainly legal, with some few geographical and social exceptions. The regulation is based on a condition that the prostitutes are selling sexual services voluntarily. In order to ensure that the prostitutes can make voluntary choices, possible sources of force are criminalised, such as exploitation through pimps and brothel-keepers. The negative sides of prostitution are attempted to be eliminated by granting the prostitutes various social and financial rights. Because these rights are dependent on a work contract – which only few of the prostitutes have and want – the measures have not been as successful as intended.

## 5.3 Regulation of the legal effect of consent

### 5.3.1 Consent in relation to voluntary prostitution

The legal regulation of voluntary prostitution sets as its basis that the prostitution is conducted voluntarily, and that the prostitute has consented to selling sexual services. The regulation does not explicitly demand consent, but by criminalising forced prostitution, it is clear that the regulation is aimed at voluntary prostitution. As consent is not explicitly required, there is no legal regulation of the consent. A definition of consent or the legal effect of such consent does not exist. There is no case law stating how a legally valid consent can be made, or the boundaries regarding the legal effect of such consent in the area of the sale of sexual services.

### 5.3.2 Consent in relation to trafficking

Trafficking is regulated in the Criminal Code section 232. In section 232(1), trafficking is understood to be where someone is using force or abusing the victim's vulnerable position to make the victim start or re-enter prostitution, or making the victim undertake/endure sexually exploitative acts.<sup>264</sup> This prostitution must happen where the victim is in a foreign country. This definition stands out, by also criminalising the act of forcing someone to re-enter prostitution, and by also including cases where someone is sexually exploited, without this necessarily meeting the definition of prostitution.

The section also criminalises promotion of prostitution for someone under the age of 21.<sup>265</sup> The wording does not specify if this only includes cases in which the victim is also a victim of trafficking, or if it applies to any possible victim under the age of 21. The context, standing within the regulation of trafficking, implies that it is only applicable to persons located in a foreign country, and that the difference between the first and second sentence is that, for persons over the age of 21, one must also prove that the perpetrator had used force or abused a position of vulnerability. For persons under the age of 21 in a foreign country, one only needs to prove that the perpetrator made them

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<sup>264</sup> German wording: "(1) Wer eine andere Person unter Ausnutzung einer Zwangslage oder der Hilflosigkeit, die mit ihrem Aufenthalt in einem fremden Land verbunden ist, zur Aufnahme oder Fortsetzung der Prostitution oder dazu bringt, sexuelle Handlungen, durch die sie ausgebeutet wird, an oder vor dem Täter oder einem Dritten vorzunehmen oder von dem Täter oder einem Dritten an sich vornehmen zu lassen, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft".

<sup>265</sup> German wording: "Ebenso wird bestraft, wer eine Person unter einundzwanzig Jahren zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Satz 1 bezeichneten sexuellen Handlungen bringt".

start or re-enter prostitution. Attempt is also criminalised, cf. section 232(2).<sup>266</sup> The third sub-section sharpens the punishment where the victim was below 14 years of age, as defined in section 176(1),<sup>267</sup> or the victim was seriously abused or in lethal danger through the abuse, or where the perpetrator was an organised criminal trafficker.<sup>268</sup>

The definition of trafficking has as basis the exploitation of a vulnerable position. In this regulation it is not relevant that the person in question consented to being trafficked or not, it is enough if the perpetrator exploited his or her vulnerability. It is questionable how the German courts will interpret exploitation of vulnerability where the victim actually consented to the prostitution, in regard to whether it is possible to exploit someone's vulnerable position where that person did consent to the act.<sup>269</sup> The main argument to be drawn from the German regulation of trafficking is that the section does not demand the lack of consent on the part of the victim for it to be classified as trafficking. The regulation of trafficking is thereby an exemption from the main rule of the sale of sexual services, by introducing objective criteria to the voluntariness and thereby limiting the possibility of consent in this area of the law.

### 5.3.3 Consent in relation to child prostitution

German Criminal Code section 180a(2) number 1 criminalises the supply of minors with a place for the exercise of prostitution.<sup>270</sup> A minor is defined as a person below the age of 18 years.<sup>271</sup> The provision does not ask for the consent of the minor to prostitution it objectively criminalises helping minors to enter prostitution by providing them with a place to exercise their prostitution. This is another example of an objective regulation limiting legally relevant consent. It is also another exemption from the main rule of the sale of sexual services, with its objective age restriction on participation.

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<sup>266</sup> German wording: "Der Versuch ist strafbar".

<sup>267</sup> German wording: "§ 176 Sexueller Mißbrauch von Kindern

(1) Wer sexuelle Handlungen an einer Person unter vierzehn Jahren (Kind) vornimmt oder an sich von dem Kind vornehmen läßt, wird mit Freiheitsstrafe von sechs Monaten bis zu zehn Jahren bestraft."

<sup>268</sup> German wording: "Auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren ist zu erkennen, wenn

1. das Opfer der Tat ein Kind (§ 176 Abs. 1) ist,

2. der Täter das Opfer bei der Tat körperlich schwer misshandelt oder durch die Tat in die Gefahr des Todes bringt oder

3. der Täter die Tat gewerbsmäßig oder als Mitglied einer Bande, die sich zur fortgesetzten Begehung solcher Taten verbunden hat, begeht".

<sup>269</sup> The author's research has not revealed any court decisions relating to this question.

<sup>270</sup> German wording: "Ebenso wird bestraft, wer einer Person unter achtzehn Jahren zur Ausübung der Prostitution Wohnung, gewerbsmäßig Unterkunft oder gewerbsmäßig Aufenthalt gewährt".

<sup>271</sup> Section 180a(2) number 1, "achtzehn Jahren".

Abuse of juveniles is criminalised in section 182(2). The section states that “the same penalty [imprisonment not exceeding 5 years] shall apply to a person over 18 years of age who abuses a person under 18 years of age by engaging in sexual activity with him or her by inducing the person to suffer sexual acts committed by him or her on their own body for a financial reward”.<sup>272</sup> This section criminalises the act where a person over 18 years of age is committing sexual acts with a minor for reward. The act is objectively criminalised, regardless of whether the minor consented to the act or not. A possible consent from the minor would have no legal effect in such a situation. Section 182(2) thereby states yet another exemption from the main rule of legal prostitution, and legally relevant consent.

A minor who prostitutes himself or herself, is not committing a criminal act. This case is in other respects regulated in the same way as adult prostitution, including the contract regarding the sale of sexual services being legally valid in respect of the claim to the agreed money. This means that the minor can claim the agreed reward before the courts. According to section 134 of the German Civil Code, a legal transaction that violates a prohibition prescribed by law is null and void, unless another result follows from the act.<sup>273</sup> Galen argues that nullifying the contract would be unreasonably profitable for the client.<sup>274</sup> The client is committing a criminal offence, but does not have to pay the prostitute. The purpose of the Prostitution Act is to protect the rights of the prostitutes; one of the main backgrounds of the Act was to make sure that the prostitutes could claim their agreed reward before the courts.<sup>275</sup> Galen therefore argues that the Prostitution Act prescribes a result other than nullification.<sup>276</sup>

#### 5.3.4 Consent in relation to forced prostitution

The Criminal Code section 232 criminalises forced prostitution. Forced prostitution means a case where someone uses force, lethal threats or deception to make someone

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<sup>272</sup> Official English translation from the Ministry of Justice. German wording: “Ebenso wird eine Person über achtzehn Jahren bestraft, die eine Person unter achtzehn Jahren dadurch missbraucht, dass sie gegen Entgelt sexuelle Handlungen an ihr vornimmt oder an sich von ihr vornehmen lässt”.

<sup>273</sup> German wording: “Ein Rechtsgeschäft, das gegen ein gesetzliches Verbot verstößt, ist nichtig, wenn sich nicht aus dem Gesetz ein anderes ergibt”.

<sup>274</sup> Margarete Gräfin von Galen *Rechtsfragen der Prostitution*, München 2004, p 32.

<sup>275</sup> Bundestagsdrucksache 14/5958 p 4.

<sup>276</sup> Galen p 32.



else start or re-enter prostitution. This is criminalised where it happens directly, and where the person makes a third person force someone into prostitution.<sup>277</sup> The element of force is defined as violence, lethal threats or deception. The minimum of force involved is deception, which is similar to the means of abuse of a vulnerable situation in the definition of trafficking. As in the German definition of trafficking, both entering and re-entering are included, which means that this section will protect a person who, after having left prostitution, gets forced back into it. This protects both prostitutes and persons without prostitution experience from being forced to prostitute themselves. The definition of forced prostitution does not mention a possible consent, and the natural meaning of the words in their context indicates that a possible consent is not relevant. Deception excludes consent, because one cannot consent to being deceived. The use of violence and lethal threats also implies that consent will be irrelevant.

In summary, there are many examples in German law where the legal effect of consent to sexual acts and to the sale of sexual acts in particular is limited. Because the sale of sexual services is legal and the contract is regarded as a normal contract, many of the principles of invalidity behind normal contracts apply. This is not regulated by a reference to the general law of contracts, but the influence of the principles can be seen from the Prostitution Act and the relevant sections of the Criminal Code.

### 5.3.5 Consent in relation to medical experiments and bodily harm

As in South Africa, consenting is an important factor in many areas of the law. Of particular interest is the consent to medical experiments and other forms of bodily harm. This is not directly relevant for the question of consent to the sale of sexual services. However, it is used here to give a systematic view on consent, showing that consent is limited in other areas of German law as well, with various reasons for justification.

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<sup>277</sup> German wording: "Nach Absatz 3 wird auch bestraft, wer

1. eine andere Person mit Gewalt, durch Drohung mit einem empfindlichen Übel oder durch List zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Absatz 1 Satz 1 bezeichneten sexuellen Handlungen bringt oder

2. sich einer anderen Person mit Gewalt, durch Drohung mit einem empfindlichen Übel oder durch List bemächtigt, um sie zur Aufnahme oder Fortsetzung der Prostitution oder zu den sonst in Absatz 1 Satz 1 bezeichneten sexuellen Handlungen zu bringen".

The German regulation of consent to bodily harm includes both medical experiments and violence, and such consent is regulated in the Criminal Code section 228, which states that causing bodily harm with the consent of the victim is lawful unless the act, in spite of the consent, violates public policy.<sup>278</sup> The section does not define where the line is to be drawn, and what kind of bodily harm is contrary to public policy. The legal literature argues that for acts that would fall under section 226 (grievous bodily harm), consent will not have legal effect.<sup>279</sup> Such an act would be contrary to public policy, regardless of the consent. For situations where such harm is less severe, the question of legality must be decided on the basis of an assessment of the seriousness and the intensity of the harm.

For consent to be legally valid, the person consenting must be able to evaluate the consequences of consenting to the act in question. The consent must further be given before the act is undertaken. The use of force or threats, or of deceit leads to the consent being legally invalid. The same goes for the situation where the person consenting misunderstands or is in mistaken belief regarding the content or the extent of what he or she is consenting to. If the mistake relates to the deciding factor for the consenting persons will to consent, the consent will be invalid as well.<sup>280</sup>

German law governing the consent to bodily harm therefore has an objective boundary in the public policy, and subjective boundary in the criteria for a legally valid consent from the person in question. Consent only has the legal effect of making the act lawful up to the point where the act is contrary to public policy, which entails the commonly accepted standards of good morals.

## 5.4 Conclusion Germany

The German regulation of prostitution is characterised by a distinct division between voluntary and involuntary prostitution. This division is of major importance when it comes to the question how the prostitution is regulated. Involuntary prostitution is

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<sup>278</sup> German wording: "Wer eine Körperverletzung mit Einwilligung der verletzten Person vornimmt, handelt nur dann rechtswidrig, wenn die Tat trotz der Einwilligung gegen die guten Sitten verstößt."

<sup>279</sup> Urs Kindhäuser *Strafrecht Besonderer Teil I*, (2. ed.) Baden-Baden 2005, p 76.

<sup>280</sup> *Op. cit* p 74.

heavily criminalised, whilst voluntary prostitution is regarded almost like any other profession.

The German regulation distinguishes itself from the South African regulation by focusing directly on the situation of the prostitutes involved in prostitution as of today. The regulation does not promote prostitution, but rather than criminalising it, wholly or partly, the German lawmakers are trying to improve the situation for the prostitutes in prostitution. The other countries are focusing more on improving the prostitutes' situation in a longer timeframe by trying to get them out of prostitution; they are not focusing that much on the shorter timeframe, i.e. the situation the prostitutes are in as long as they are involved in prostitution.

## 6. Norway

### 6.1 Overview of the regulation of prostitution

#### 6.1.1 Introduction

In Norway it is illegal to buy, but legal to sell sexual services. The regulation of prostitution was changed by a law reform in 2009. Before that, both buying and selling of sexual services was legal. The Norwegian one-sided criminalisation is founded on a moral condemnation of the act of buying sexual services, and Norway thereby places itself in the moral tradition.<sup>281</sup> The reformed Norwegian regulation criminalises everyone participating in prostitution, except the prostitutes. Pimping and brothel keeping, trafficking and child prostitution are criminalised. Aiding and abetting any of the criminalised acts specified in the Criminal Code chapter 19 regarding sexual offences is generally criminalised in section 205.<sup>282</sup> This section does not criminalise the prostitute with regard to section 202a, meaning that the prostitute is not regarded as having aided and abetted the buyers' offence.<sup>283</sup>

Norway is part of the Nordic law tradition, and the legal method is characterised by the fact that wording, preparatory work and case law are important legal sources in the interpretation of the acts. Because the regulation of prostitution is part of criminal law, the rule of law is important in the interpretation.<sup>284</sup>

The regulation of rape in marriage constitutes interesting background information for the question of consent to the sale of sexual services. Not because it is so similar that one could draw direct parallels between these fields of law, but rather because it says something about how the law has regulated consent to sex in different contexts. The question of whether marriage is deemed as consent to sex, gives systematic insight into consent to sexual acts. A similarity between the fields of law is that where sexual acts

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<sup>281</sup> Ot.prp. nr. 48 (2007-2008) Om lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.), Oslo 2008, paragraph 5.4.3.

<sup>282</sup> Norwegian wording of section 205: "Straffebud i dette kapittel rammer også den som medvirker til handlingen".

<sup>283</sup> See the preparatory work, Ot.prp. nr. 48 (2007-2008), paragraph 6.1 and 10.1.

<sup>284</sup> See chapter 1.5.3 for more about the national method of interpretation.

are undertaken without consent, this is often a criminal offence. In prostitution, it is regulated as various forms of illegal prostitution, and non-consensual sex in marriage is often, but not always, regulated as rape.

Norway was early in criminalising marital rape. In Norway, marital rape was for a long time seen impossible, and the spouse would in such respect only be convicted of assault.<sup>285</sup> With a case decided in 1974, the Supreme Court convicted a man of raping his wife, and by that they ruled that marital rape was criminal.<sup>286</sup> Norway was thereby the first among the countries analysed in this thesis to criminalise marital rape. The fact that Norway was earlier than the other countries compared in this thesis can be seen in connection with the Equality Act of 1978, establishing by law the right to equality between the sexes.<sup>287</sup>

### 6.1.2 Buying sexual services

The new section 202a of the Criminal Code criminalises the act of buying sexual services. The section criminalises a person who gains sexual services for reward.<sup>288</sup> The reward can be paid or agreed by him or her, cf. letter a) or a third person, cf. letter b). The section also criminalises cases where someone, through the means listed in a) and b), makes another person commit sexual acts on/with him or herself, cf. letter c). The punishment is fines and/or imprisonment for no longer than six months. In cases where the sexual act happened in a particularly offensive manner or where the act cannot be punished under another section, the punishment is no longer than one year of imprisonment.<sup>289</sup> The attempt to buy sexual services is also criminalised. An attempt is committed when agreement has been reached or the reward has been paid. The criminal act of buying is committed when the sexual act has begun.<sup>290</sup>

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<sup>285</sup> For example, Rt. 1964.18.

<sup>286</sup> Rt. 1974.1121.

<sup>287</sup> Norwegian title Likestillingsloven, adopted 09.06.1978, came into force 15.03.1979.

<sup>288</sup> Norwegian wording, section 202a: "Med bøter eller fengsel inntil 6 måneder eller begge deler straffes den som

a) skaffer seg eller andre seksuell omgang eller handling ved å yte eller avtale vederlag,

b) oppnår seksuell omgang eller handling ved at slikt vederlag er avtalt eller ytet av en annen, eller

c) på den måten som beskrevet i bokstav a eller b får noen til å utføre med seg selv handlinger som svarer til seksuell omgang".

<sup>289</sup> Norwegian wording section "Er den seksuelle omgang eller handling skjedd på en særlig krenkende måte, uten at forholdet straffes etter andre bestemmelser, er straffen fengsel inntil 1 år".

<sup>290</sup> Johs. Andenæs *Spesiell strafferett og formuesforbrytelsene*, by Kjell V Andorsen, Oslo 2008, p 176.

The wording can be translated to criminalise intercourse and other sexual acts, but the wording “omgang” is not supposed to be limited to intercourse; other sexual acts are also included. This issue is not decisive for the question of buying sexual services, because both are criminalised. A sexual act is an act in which the sexual organs of one or both are involved.<sup>291</sup> The word reward is to be understood as a monetary or another form of reward, such as drugs, alcohol, clothing or jewellery.<sup>292</sup> There must be a causal connection between the sexual act and the reward. Gifts given in connection with a coincidental sexual encounter are not deemed as purchase of sexual services.<sup>293</sup>

### 6.1.3 Pimping and brothel keeping

Brothel keeping and pimping are both criminalised in Norway by section 202 of the Criminal Code, which criminalises the promotion of someone else’s prostitution.<sup>294</sup> In letter a), the section criminalises the promotion of someone else’s prostitution in general, which is aimed at pimping. Letter b) criminalises the renting out of premises on the understanding that they will be used for prostitution, and is aimed at brothel keeping. The two sub-sections cover the same area, the promotion of prostitution and letter b) can be seen as a specialised version of letter a).<sup>295</sup> The sections also differ in the degree of guilt. Gross negligence about the purpose of prostitution is also included in letter b), whilst letter a) demands intent. The sentencing frame is fines and/or up to 5 years of imprisonment. The wording criminalises the promotion of someone else’s prostitution, and prostitution is defined in 202(3) as sexual services for reward.<sup>296</sup> The Supreme Court, in a case from 2004, already ruled one single incident of the sale of sexual services to be included in the definition of prostitution.<sup>297</sup> Unlike the regulation in South Africa and Germany, the law in Norway does not demand that the sale of sexual services happens regularly for it to be included in the definition of prostitution. The consequence of this is that there is no distinction between experienced prostitutes and

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<sup>291</sup> *Op. cit.* p 140.

<sup>292</sup> *Op. cit.* p 175.

<sup>293</sup> *Op. cit.* p 175-176.

<sup>294</sup> Norwegian wording: “Den som

a) fremmer andres prostitusjon eller

b) leier ut lokaler og forstår at lokalene skal brukes til prostitusjon eller utviser grov uaktsomhet i så måte,

straffes med bøter eller fengsel inntil 5 år”.

<sup>295</sup> Andenæs p 178.

<sup>296</sup> Norwegian title Straffeloven. Norwegian wording of section 202(3): “Med prostitusjon menes i denne bestemmelsen at en person har seksuell omgang eller handling med en annen mot vederlag”.

<sup>297</sup> Rt. 2004.331, the *Skippagurra* case.

persons who are only selling sex a few times. The focus of the regulation is on the act of the sale of sexual services in itself. In South Africa, there was a debate in the *Jordan* case about the necessity of regularity of the sale, and the Constitutional Court concluded that regularity was a criterion, and that the Sexual Offences Act criminalised what is normally understood as prostitution.<sup>298</sup> Norway differs on this subject, and already defines one incident of selling sexual services as prostitution.

There have been some court cases regarding pimping and brothel keeping in Norway. In the *Skippagurra* case of 2004, the question was whether the accused had acted with adequate guilt.<sup>299</sup> The case was about a camping site near the border to Russia, where Russian women repeatedly came visiting. The owner of the camping site had invited the women before each visit, and guaranteed for their stay in order for them to obtain visas. The Supreme Court ruled that it was not a criterion that he should have known the identity of the persons selling sexual services from his camping site.<sup>300</sup> It was enough that he had known that some had done this.<sup>301</sup> This was sufficient guilt for a violation of section 202, and the owner was sentenced for promoting prostitution.<sup>302</sup>

Section 202 also criminalises public advertisement for prostitution, in subsection (3).<sup>303</sup> For this section to be violated, the advertisement must be clearly about prostitution, and both offering prostitution, arranging for prostitution or asking for prostitutes. This section criminalises something that, in other countries, such as South Africa, is known as soliciting. The section does not distinguish between the possible perpetrators, and therefore also criminalises a prostitute who advertises for his or her own prostitution by the listed means.<sup>304</sup>

The kind of prostitution that it is criminal to promote through section 202 is voluntary prostitution. Promotion of forced prostitution and exploitation of someone else's

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<sup>298</sup> See chapter 4.2.1.

<sup>299</sup> Rt. 2004.331, paragraph (1).

<sup>300</sup> Rt. 2004.331, paragraph (41).

<sup>301</sup> Rt. 2004.331, paragraph (35) and (40).

<sup>302</sup> Rt. 2004.331, paragraph (42) and (56).

<sup>303</sup> Norwegian wording: (3) "Den som i offentlig kunngjøring utvetydig tilbyr, formidler eller etterspør prostitusjon, straffes med bøter eller med fengsel inntil 6 måneder".

<sup>304</sup> Ot.prp nr 28 (1999-2000) *Om lov om endringer i straffeloven mv. (seksuallovbrudd)* Oslo 2000, paragraph 16.1, and Andenæs p 178.

prostitution is criminalised in section 224, which includes both trafficking and other forced prostitution.

For a man to be living off the earnings of a woman's prostitution was a criminal offence in Norway, in the old section 206(3) of the Criminal Code.<sup>305</sup> This section has been repealed, and the kind of exploitation of others' prostitution that the old section 206(3) was aimed at is now covered partly by 202 promoting someone else's prostitution, and section 224 on forced prostitution and exploitation of prostitution.

## 6.2 Selling sexual services

### 6.2.1 Legal, but still illegal?

The sale of sexual services is not criminalised in Norway, and criminal law therefore does not contain a section regulating this. This does not mean that the sale of sexual services is not regulated in Norwegian law. Some aspects, such as soliciting, are criminalised, see section 202(3), also discussed under chapter 6.1.3.

Even though the act of selling sexual services is not meant to be a criminal act, in Norway there are some aspects of this being criminalised through other sections. It is especially the duty to pay tax and the right to damages for loss of income that are the aspects under which prostitution is criminalised.

Under Norwegian tax law, all income and money on bank accounts must be declared for tax. Where one cannot declare from where the money stems, one will have to pay an estimated tax. Income from prostitution gets assessed for tax, and the prostitutes will have to pay tax on the money on their accounts.<sup>306</sup> This is a tricky subject, because by imposing tax on this income, the state profits from their prostitution. In some situations, the prostitutes will have to continue to work as prostitutes to work off the tax.<sup>307</sup> The Minister of Finance stated in 2006 that they would consider making a tax-exemption for income generated by prostitution. A law reform has not yet been adopted.

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<sup>305</sup> Andenæs p 178.

<sup>306</sup> The Tax Assessment Act of 1980 section 8-2, Norwegian name Ligningsloven, cf. the Tax Act of 2000 section 2-1(9), Norwegian name Skatteloven.

<sup>307</sup> Gregar Berg-Rollness Bestikkelser/korrupsjon og uønskede aktiviteter – skatteplikt for ulovlig inntekt, in Skatterett, 2007 number 3, pp 198-215, p 199.



There have been a series of court cases before Borgarting Lagmannsrett regarding damages for loss of income that would have been generated from prostitution. The first couple of cases regarded assaults that had happened before the new section 202a criminalising the buying of sexual services came into force. Borgarting Lagmannsrett ruled on 16.05.2006 that income generated by prostitution was included in the right to damages, and granted four prostitutes damages for loss of income by prostitution.<sup>308</sup>

The same court, on 07.05.2007 ruled that the law on damages protected income generated by prostitution. The majority stated that there were no reasons for excusing the perpetrator from the responsibilities following from having made someone unable to work because the person's income was generated by prostitution. The minority disagreed, and argued that the law on damages could not protect undocumented income generated through an unwanted business by a person being in the country illegally.

A third case was brought before Borgarting Lagmannsrett on 09.05.2008, and the court here was also divided into a majority and a minority. The majority held that income generated by prostitution was legally protected, and granted the two prostitutes damages. The minority did not, and argued that a contract regarding prostitution was immoral and that the damages claim therefore was not legally protected.<sup>309</sup>

After these three cases regarding loss of income protected by the law on damages, the court changed its view in 2010. On 15.03.2010, Borgarting Lagmannsrett decided a case regarding this.<sup>310</sup> Income generated by prostitution was not included in the damages claim, it was regarded as immoral and therefore not protected by the law. The court was unanimous when ruling that income generated by prostitution is not legally protected under Norwegian law. The case concerned a prostitute who lawfully could reside and take work in Norway, who had been assaulted and therefore was unable to work as a prostitute for some time. The court argued that even though the sale of sexual services was legal, prostitution as such was seen as an unwanted activity in Norway. And by criminalising the act of buying sexual services, the parliament highlighted that

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<sup>308</sup> LB-2005-138054.

<sup>309</sup> RG-2008-1137.

<sup>310</sup> LB-2009-93028.

prostitution was unwanted. The main argument from the court was that a contract regarding prostitution was to be deemed as against honour, or immoral, and thereby not binding between the parties, cf. the Norwegian Act of 1687, section 5-1-2.<sup>311</sup> The court's argument was that, if the contract did not have legal protection, and buying was criminalised, it would not be consistent to grant legal protection to the prostitute's loss of income.

These cases show that, even though prostitution is legal in Norway, there is a discrepancy in the regulation when it comes to income generated by prostitution. None of the subjects, neither tax nor damages, has come before the Supreme Court yet. The discrepancy of being a legal business on the one hand and the lack of rights on the other hand creates a problematic situation that does not help the prostitutes. The law reform was intended to make life easier for the prostitutes; leaving the regulation of tax and damages untouched does not achieve this aim.

### 6.2.2 Enforcement of the regulation by the police and the courts

The police are not targeting the prostitutes when enforcing the new section 202a, regarding buyers. However, because the prostitutes indicate where the trade takes place, the police spy on them and follow their actions in order to track down buyers. By policing the buyers, the police will also find the prostitutes. If the police suspect that the prostitutes have committed other offences, such as being in the country illegally, they will also be prosecuted. So even though they are not prosecuted for selling sexual services, they will be investigated for other offences. In a case from 1998, Borgarting Lagmannsrett, a county court, as the first court in Norway decided a case regarding foreigners' right to take work in Norway, and regarding the question whether prostitution was to be considered as work in the sense of the Alien Act section 6. The court found that prostitution was to be deemed as work in this sense, and ruled to expel the man from Norway, and to withdraw the income he had made from prostitution in Norway.<sup>312</sup> In 1999, the Supreme Court overruled the county court, and acquitted the

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<sup>311</sup> Norwegian title, Kong Christian den Femtis Norske Lov, "Alle Contracter som frivilligen giøris af dennem, der ere Myndige, og komne til deris Lavalder, være sig Kiøb, Sal, Gave, Mageskifte, Pant, Laan, Leje, Forpligter, Forløfter og andet ved hvad Navn det nævnis kand, som ikke er imod Loven, eller Ærbarhed, skulle holdis i alle deris Ord og Puncter, saasom de indgangne ere".

<sup>312</sup> Case decided on 04.12.1998, referred in LB-1998-2236.

man.<sup>313</sup> They found that prostitution was not the kind of work that needed a work permit. The Supreme Court stated that, if they were to uphold the judgement from the county court, they would practically be criminalising the prostitution of foreigners in Norway.<sup>314</sup> However, even though the prostitution of foreigners without a work permit is not illegal, other violations of the Alien Act will still be regarded as criminal offences, such as being in Norway without a valid residence permit.

## 6.3 Regulation of the legal effect of consent

### 6.3.1 Consent in relation to voluntary prostitution

In relation to voluntary prostitution, consent has a limited legal effect. It is illegal to buy sexual services, irrespective of whether such services are bought from a person who provides them voluntarily or is forced to do so, but the punishment for the buyer depends on the voluntariness of the prostitution. Prostitution is seen as a violation of the prostitute, regardless of whether or not the person in question had consented. The Norwegian regulation does not ask for consent, and there are no criteria to be fulfilled by such consent in order to be legally valid. In Norway, it is not the presence or lack of consent that is in focus. Rather, the act is objectively deemed as unwanted and a violation of the prostitute and the rights of the community as a whole. An interesting feature of the Norwegian regulation is that even though it deems prostitution to be a violation of the prostitute, it does not grant the prostitute the rights as a victim in the criminal procedure. The prostitute is only seen as a witness to the buyers' offence. A person who is regarded as a victim in a criminal procedure is granted rights such as access to police documents in the case, the right to be informed of the police' decisions and the right to file a complaint against these decisions. Some criminal provisions do not have human victims, they only protect public interests. In the preparatory work, it is debated who and what the provision criminalising the buying of sexual services is supposed to be protecting, and the Ministry and later the Parliament concluded that the provision was only to protect public interests.<sup>315</sup> This has been criticised by theorists, arguing in favour of a law reform.<sup>316</sup>

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<sup>313</sup> Rt 1999.763.

<sup>314</sup> Rt 1999.763, last paragraph.

<sup>315</sup> Ot.prp. 48 (2007-2008) paragraph 5.8.

<sup>316</sup> See Ellen Hagen *Sexofre uten vern*, reader's letter in Dagbladet 24.02.2009; and Ellen Hagen *Lysbakkens kvinner mellom natur og kultur*, reader's letter in Morgenbladet 08.10.2010.

In summary, the act of prostitution is seen as a violation of the prostitute and the rights of the community, regardless of whether or not the prostitute consented to the act. A possible consent only has the legal effect of influencing the length of the possible punishment for the buyer or the pimp.

### 6.3.2 Consent in relation to trafficking and other forced prostitution

Norway is a state party to the Palermo Protocol, and by section 224 of the Criminal Code the Palermo Protocol's criminalisation of human trafficking is intended to be implemented in Norwegian law.<sup>317</sup> The section includes both the regulation of trafficking and the regulation of forced prostitution. The wording states that it is a criminal offence to exploit another person for prostitution or other sexual purposes, and to trick someone into letting himself or herself being exploited in this manner, by the use of violence, threats, abuse of a position of vulnerability or other improper behaviour.<sup>318</sup> The section, in sub-section two, criminalises the aiding and abetting of human trafficking by criminalising any kind of participation in the transportation, in the exploitation or tricking the person into being exploited, or the giving of a reward in order to obtain consent from a person who has authority over the possible victim of trafficking, or the receiving of such reward.<sup>319</sup> The Norwegian regulation makes a distinction between trafficking of minors and trafficking of adults. Section 224(3) states that the actions mentioned in the first or second subsection are unlawful regardless of the means used. Exploitation of a minor for prostitution or other sexual purposes is thereby criminalised, regardless of whether violence, threats, abuses of a position of vulnerability or other improper behaviour have been used. The fact that the perpetrator thought that the prostitute was an adult does not make the act non-punishable, unless the perpetrator had shown no negligence in that respect.<sup>320</sup>

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<sup>317</sup> Andenæs p 179.

<sup>318</sup> Norwegian wording: "Den som ved vold, trusler, misbruk av sårbar situasjon eller annen utilbørlig atferd utnytter en person til a) prostitusjon eller andre seksuelle formål, ... eller forleder en person til å la seg bruke til slike formål, straffes for menneskehandel med fengsel i inntil 5 år".

<sup>319</sup> Norwegian wording: "På samme måte straffes den som

a) legger forholdene til rette for slik utnyttelse eller forledelse som nevnt i første ledd, ved å anskaffe, transportere eller å motta personen,

b) på andre måter medvirker til utnyttelsen eller forledelsen, eller

c) gir betaling eller annen fordel for å få samtykke til utnyttelsen fra en person som har myndighet over den fornærmede, eller som mottar slik betaling eller annen fordel".

<sup>320</sup> Norwegian wording, section 224(3): "Den som begår en handling som nevnt i første eller annet ledd mot en person som er under 18 år, straffes uavhengig av om vold, trusler, misbruk av sårbar situasjon

The punishment for a violation of section 224 (1) and (2) is imprisonment for up to five years. Severe trafficking is punished with imprisonment for up to 10 years, cf. section 224(4).<sup>321</sup> Some examples of circumstances implying that the trafficking is considered as being severe, has been gross are listed in the sub-section and include cases where the victim was a minor, where the violence used was severe, where force was used, and where the trafficking yielded a large profit. This list is not exhaustive; other circumstances can also make the trafficking severe. This can be seen from the wording, which states that the listed circumstances shall be particularly emphasised in the assessment of whether the trafficking was severe. This implies that other circumstances will also be relevant in the assessment.

The regulation of trafficking operates with objective criteria. There is no criterion demanding a subjective, personal lack of consent. Whether or not the person in question has consented is not relevant, the question as to whether or not the act will be conserved as trafficking is based on an assessment of the objective criteria: transport, exploitation or tricking someone into prostitution or other sexual purposes, by the means listed. Where these criteria are met, the act is considered to constitute trafficking and a criminal offence. Consent by a person in such a situation does not have legal effect and is regarded as not being present.

An interesting feature of the Norwegian regulation of trafficking is that it is combined with the regulation of forced prostitution. The act of trafficking is not defined by crossing a national border, similar to the Palermo Protocol's definition.<sup>322</sup> The international aspect, which is important in South Africa, in Germany, is not a criterion for trafficking here. Trafficking and forced prostitution is defined as the act of exploiting someone for prostitution or other sexual purposes and applies to both persons transported across a border and those who have stayed inside the country the whole time. This regulation does not make a distinction between the different victims of

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eller annen utilbørlig atferd er anvendt. Villfarelse om alder utelukker ikke straffskyld, med mindre ingen uaktsomhet foreligger i så måte“.

<sup>321</sup> Section 224(4). Norwegian wording: “Grov menneskehandel straffes med fengsel inntil 10 år. Ved avgjørelsen av om overtredelsen er grov, skal det særlig legges vekt på om den som ble utsatt for handlingen, var under 18 år, om det ble brukt grov vold eller tvang eller om handlingen ga betydelig utbytte. Villfarelse om alder er uten betydning, med mindre ingen uaktsomhet foreligger i så måte“.

<sup>322</sup> See chapter 1.3 about the use of the term border here.

exploitation of prostitution; it focuses on the exploitation and the means used. Such a regulation does then not make the – sometimes – artificial distinction between persons exploited within a country and persons exploited in a foreign country. This regulation also affects the legal effect of prostitution. In other countries the consent of a trafficked person does not have any legal effect, but the consent of a non-trafficked prostitute does. In Norway this is not the case. The distinction between the groups does not go along the lines of crossing a border or not, it is decided on the basis of whether or not the person has been exploited or forced into prostitution. The legal effect of consent therefore has nothing to do with whether the victim in question has crossed a border or not, consent can only be relevant where the prostitution has not been of such severe character.

### 6.3.3 Consent in relation to child prostitution

Buying sexual services from a minor is a criminal offence, cf. section 203 of the Criminal Code.<sup>323</sup> The section is similar to section 202a regulating the buying of sexual services from an adult, by that the same ways of violating the section are listed in letters a) to c). The wording in letters a) to c) is to be understood coherently to the wording in section 202a, letter a) to c).<sup>324</sup> Similar to section 224(3) regarding trafficking and exploitation of the prostitution of minors, it is not an excuse that the perpetrator did not know that the person in question was a minor. This can only make the act non-punishable where the perpetrator had shown no negligence in that respect.<sup>325</sup>

If the minor was either under the age of 16 or under the age of 14, the act will be punishable under sections 195 and 196 in addition to section 203. Section 195 criminalises sexual acts with minors under the age of 14, and section 196 criminalises the same conduct with minors under the age of 16.<sup>326</sup>

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<sup>323</sup> Norwegian wording: “Med bøter eller fengsel inntil 2 år straffes den som

a) skaffer seg eller andre seksuell omgang eller handling med personer under 18 år ved å yte eller avtale vederlag,

b) oppnår seksuell omgang eller handling med personer under 18 år ved at slikt vederlag er avtalt eller ytet av en annen, eller

c) på den måten som beskrevet i bokstav a eller b får personer under 18 år til å utføre med seg selv handlinger som svarer til seksuell omgang”.

<sup>324</sup> Ot.prp. 48 (2007-2008), paragraph 10.1, see more on them under 6.1.2.

<sup>325</sup> Norwegian wording: “Villfarelse om alder utelukker ikke straffeskyld, med mindre aktsom god tro foreligger”.

<sup>326</sup> Norwegian wording section 195(1): “Den som har seksuell omgang med barn under 14 år, straffes med fengsel inntil 10 år. Dersom den seksuelle omgangen var samleie, er straffen fengsel i minst 3 år”. Section 196(1): “Den som har seksuell omgang med barn under 16 år, straffes med fengsel inntil 6 år”.

Consent from a minor to the sale of sexual services is not given legal effect in the Norwegian regulation. The possibility of legally relevant consent is limited by an objective standard: the age of the person.

#### 6.3.4 Consent in relation to medical experiments and bodily harm

As for the other countries, it is interesting to look at how the countries have regulated consent in other areas of the law. This is because it shows how the country regulates consent in a more systematic view. To take a detour and look at consent in other areas of the law can show discrepancies and coherences in the law, and places the question of consent in regard to the sale of sexual services in a larger context.

In Norway, consent to medical experiments and bodily harm are both partly regulated by section 235 of the Criminal Code. This sub-chapter will first deal with bodily harm perpetrated by violence, and section 235 in general. This is applicable to both violent acts and medical experiments. The particularities regarding medical experiments will be dealt with at the end of this chapter.

In Norway does consent have the legal effect of providing impunity to the perpetrator of assault and bodily harm. Consent has this effect up to injuries constituting grievous bodily harm. The Criminal Code section 235 regulates consent to bodily harm. The wording in 235(1) states that punishment according to sections 228 and 229 will not apply if the act has happened with the victim's consent.<sup>327</sup> The section thereby decriminalises bodily harm when the person who suffers the bodily harm has consented. In Norway, bodily harm is divided into three groups, depending on their severeness: Section 228 regulates assault, section 229 regulates bodily harm, and section 231 regulates grievous bodily harm. The acts under 228 and 229 can become non-punishable pursuant to section 235 if the victim has consented. Section 235(2) regulates the legal effect of consent to bodily harm resulting in death or grievous bodily harm.<sup>328</sup> Consent has, in these situations, the legal effect of making it possible to reduce the

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<sup>327</sup> Norwegian wording: "Straf efter §§ 228 og 229 kommer ikke til Anvendelse, naar Handlingen er foretaget med nogen, som deri har samtykket."

<sup>328</sup> Norwegian wording: "Er nogen med eget Samtykke dræbt eller tilføjet betydelig Skade paa Legeme eller Helbred, ... kan Straffen nedsættes under det ellers bestemte Lavmaal og til en mildere Strafart".

punishment to under the legally prescribed minimum and to a milder form of punishment. This means that, where the act has a prescribed minimum imprisonment time, the perpetrator can be sentenced to a shorter period of time, and theoretically the act can be punished with fines instead of imprisonment. Nevertheless, the possibility of fines is of a more theoretical than practical nature, taking into account that the acts in question are murder and intentional grievous bodily harm.<sup>329</sup>

The perpetrator's intent is crucial for the evaluation of whether section 235 applies to the act. It is only the intended application of grievous bodily harm that is to be evaluated by section 235(2).<sup>330</sup> Where the perpetrator's intent only covers bodily harm below this level of severeness, consent can have the legal effect of providing impunity for the perpetrator, even though the consequence of the act is grievous bodily harm or death. Under other circumstances, the act can be regarded as involuntary manslaughter.<sup>331</sup> Where it is regarded as involuntary manslaughter, consent will not have the effect of impunity, because this is not included in section 235.

It is unclear whether acts which fall under the scope of application of section 232 (bodily harm applied in a particularly serious manner) can receive impunity based on section 235. Section 232 regulates various forms of bodily harm applied in a particularly severe manner, and expands the sentencing framework and sentencing methods from those which apply according to sections 228 and 229.<sup>332</sup> For acts perpetrated in this manner, imprisonment must be applied, and the minimum sentence is 3 years, and up to 21 years where the victim dies. The listed circumstances are the use of poison, weapons, where the victim was defenceless, where the act was motivated by racism, where the act happened unprovoked, where there was more than one perpetrator and where the act had the character of abuse. The list is not exhaustive. Some authors are of the opinion

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<sup>329</sup> Kjell V Andorsen *Strafferettslig samtykke*, in Tidsskrift for rettsvitenskap, 1992 pp 305-475, p 326.

<sup>330</sup> Andenæs p 106.

<sup>331</sup> *Ibid.*

<sup>332</sup> Norwegian wording: "Er nogen i §§ 228-231 nævnt Forbrydelse forsætlig udført paa en særlig smertevoldende Maade eller ved hjælp av Gift eller andre Stoffe, der er i høi Grad farlige for Sundheden, eller ved Kniv eller andet særlig farlig Redskab, eller under andre særdeles skjærpande omstændigheder, blir altid Fængsel at idømme, og kan for Forbrydelsen mod § 231 Fængsel inntil 21 år i ethvert Tilfælde anvendes samt ellers Straffen forhøies med indtil 3 Aar. Straffen i § 228 første ledd forhøies likevel bare med inntil 6 måneders fengsel, samtidig som bøter fortsatt kan idømmes. Ved avgjørelsen av om andre særdeles skjærpande omstændigheter foreligger, skal det særlig legges vekt på om overtredelsen er begått mot en forsvarsløs person, om den er rasistisk motivert, om den er skjedd uprovosert, om den er begått av flere i fellesskap, og om den har karakter av mishandling".



that such acts are included in the scope of application of 235, because they deem 232 not to be an independent section. They argue that section 232 is a section that cannot be used independently of sections 228 and 229, and because 232 is an accessory to the sections included in 235, acts under 232 must also be included in 235.<sup>333</sup> Other scholars find this argument to be formal, and not decisive.<sup>334</sup> The question of whether section 232 is to be included in section 235 was not debated in the preparatory work. Another section, 385 regarding use of particularly dangerous weapons in a fight, is explicitly excluded from the scope of application of 235. Andorsen argues that it seems as though this distinction between 232 and 385 in the juridical theory is based on the legislative technique behind the sections, and this reasoning in the juridical theory is, in his opinion, not convincing and leads to an unfortunate result.<sup>335</sup> When it comes to the practicability of the question of consent to bodily harm applied in a particularly serious manner, most of the theorists find the question mainly of theoretical interest. The typical example used is consent to sadomasochistic sex. Theorists argue that the legal effect of consent to acts under 232 must be interpreted narrowly with regard to its scope, based on the need to protect people from such acts.<sup>336</sup> This is in line with the reasoning behind section 235(2). One of the arguments why consent to severe bodily harm is not given impunity is because the individual should not be given the right to decide over his or her body and health in such manner.<sup>337</sup>

The conditions for legally valid consent are not regulated in the Criminal Code. Consent must be given by the possible victim, and can be withdrawn at any time. According to the case law, it is not a condition that the person giving the consent is over 18 years. The deciding factor is whether the person in question is old enough and mature enough to understand and evaluate the meaning of the consent to the act in question.<sup>338</sup> A 15-year-old girl was, in a case before the Supreme Court, regarded as old enough and mature enough to give legally valid consent to the injection of a shot of amphetamine.<sup>339</sup> In other situations, such as sterilisation and transplantation the age limit is regulated in the

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<sup>333</sup> Andenæs p 106.

<sup>334</sup> Andorsen 1992, p 324-325.

<sup>335</sup> Andorsen 1992, p 324-325.

<sup>336</sup> *Op. cit.* p 326.

<sup>337</sup> *Op. cit.* p 331 and 333.

<sup>338</sup> Andenæs p 109.

<sup>339</sup> Rt 2004.849.

respective acts.<sup>340</sup> There is no criterion that the person in question be sober – the influence of alcohol does not automatically lead to consent being invalid. Whether the consent is valid or not depends on an evaluation of the whole situation.<sup>341</sup>

Medical experiments with no, or only partially healing purposes, are not regulated in the Criminal Code, but in legal theory the opinion is that, as long as these experiments are conducted in a manner that is medically ethical and coherent to the medical standards, a patient can consent to undergo such experiments.<sup>342</sup> The regulation of consent to medical experiments in other respects follows the regulation in section 235 of the Criminal Code. Some areas of medical law are regulated in separate acts. Transplantation is regulated in the Transplantation Act of 1973, and according to section 1(1), transplantation can only be conducted when the operation does not cause any imminent danger to the donor's life or health.<sup>343</sup> In this case, the legal effect of consent is limited to situations where the transplantation does not constitute a danger for the donor. Consent in other situations will not have the legal effect of making the transplantation legal.

The Norwegian regulation of consent has a wide scope of application, wider than in many other countries. The scope of application of section 235 is strongly debated in legal theory. One of the arguments raised in the debate is that it is not punishable for a medical student to saw off another person's finger for practice of amputation. This is not classified as grievous bodily harm, which means that with consent it is not punishable.<sup>344</sup> This example shows how important the legal effect of consent is under Norwegian law.

In summary, consent to various forms of bodily harm is given far-reaching legal effect in Norwegian law. One can, with few limitations, consent with the effect of impunity to relatively severe bodily harm. It is interesting that, of the three countries in this comparison, Norway has the widest-ranging legal effect of consent to bodily harm, and

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<sup>340</sup> The Sterilisation Act, section 2. Norwegian name Steriliseringsloven.

<sup>341</sup> Andenæs p 109.

<sup>342</sup> Andorsen 1992, p 376.

<sup>343</sup> Norwegian wording: "Fra person som har gitt skriftlig samtykke kan organer eller annet biologisk materiale tas til behandling av sykdom eller legemsskade hos en annen. Inngrep kan bare foretas når det ikke medfører noen nærliggende fare for giverens liv eller helse".

<sup>344</sup> Andenæs p 107.

at the same time the effect of consent to the sale of sexual services is the most limited in these countries. Norway operates with a strict limitation of the personal autonomy, represented by the restricted possibility of giving legally valid consent in the area of prostitution. And in other areas consent is given an important legal effect.

#### **6.4 Conclusion Norway**

In Norway, most of the area of prostitution and its surrounding activities are criminalised. It is a political aim to try to eradicate prostitution. This is founded on a moralist condemnation of prostitution. The fact that the law follows the moralist tradition can also be seen in the examples of denied damages for loss of income generated by prostitution and the duty to pay tax on such income. These examples also show the discrepancies in the national regulation of prostitution in Norway. There is a lack of a systematic regulation of prostitution, which leads to incoherent results in different areas of the law.

The regulation of consent to the sale of sexual services is that it is in general not legally relevant. A prostitute's consent to the sale of sexual services is not given legal effect in the question of whether buying is legal or not. Consent only has legal effect on the question of what kind of offence the prostitute has been subjected to, i.e. normal prostitution in section 202a or the heavier-sanctioned human trafficking and exploitation in section 224.

## **7. Findings made in the comparison and remarks de lege ferenda**

### **7.1 Introduction**

This chapter compares and discusses the findings made in this thesis. The first part highlights the differences and similarities between the three compared countries. The second part focuses on the problem of the different implementation of CEDAW article 6, and highlights challenges and possible solutions with the legal effect of consent to the sale of sexual services.

### **7.2 Comparison: differences and similarities in the national regulations**

As one can see from the description of the different countries in the foregoing chapters, there are many differences in the regulation of prostitution. The three countries represent different traditions, with South Africa and Norway representing the moral tradition and Germany representing the pragmatic tradition. The countries differ in how they view the question of prostitution as such: is it about protecting society from the moral decay prostitution represents, or is it about respect for independent workers, or is it about protection of prostitutes? In South Africa, it is a crime to sell sexual services, based on a moral condemnation of the act. In Germany, it is a profession, and the regulation is similar to other labour laws. In Norway, it is a crime to buy the sexual service, but not to sell it, based on the thought of protecting the weaker party in the transaction. The countries also differ in how they classify the buyers: in South Africa and Norway, they are criminalised, but with different reasoning. In Germany, buying sexual services is a legal act, similar to buying other services.

But even though the result of the regulation is different, the countries have many similarities as well. They all criminalise much of the surrounding activities to prostitution, and in all countries it is a criminal offence to exploit prostitutes. These regulations are made to protect the prostitutes, and the countries share this purpose. The three countries also share the regulation of trafficking. They all condemn trafficking, and this is a relatively heavy penalised offence in all three countries. This shows that

none of the countries wants that kind of forced prostitution. And this is an interesting finding.

Another similarity is that they all have criteria to, and limitations on, the possibility of consenting to different forms of bodily harm, exemplified by medical experiments and bodily harm applied through violence. How far the limitations go, differs between the countries, but they all have an absolute limit with regard to where the consent is not given legal effect anymore. The requirements for a legally relevant consent also differ, from a detailed regulation in the South African National Health Act, to a more guiding principle of evaluating the person and the situation in question in Norway. Their requirements differ in that South Africa and Germany operate with strict categories of age and mental abilities, whilst the regulation in Norway is based on a specific assessment of the situation in question.

### **7.3 *De lege ferenda*: Further questions and challenges**

The foregoing chapters have raised many questions and challenges when it comes to the international regulation of prostitution, and specifically the regulation of the legal effect of consent to the sale of sexual services. The rest of this chapter will focus on three challenges or questions that have been formed in the process of writing this thesis. The first challenge is that there is no common implementation of the human rights granted in CEDAW article 6. The second challenge is that the general principles for the regulation of the legal effect of consent do not seem to apply to the act of the sale of sexual services. The third challenge is the distinction that is made between trafficking and other forms of prostitution.

#### **7.3.1 A universal implementation of the rights granted in CEDAW article 6?**

The study of the national regulations shows a different understanding of the duty under CEDAW article 6. As one can see from the presentation of the regulation in these three countries, the right enshrined in CEDAW article 6 is implemented differently. This means that the rights differ, depending on where you are in the world, and this is a problem. Human rights are supposed to be universal and apply to everyone everywhere. This comparison shows that this is not the case – the various countries do not grant the same right. In order to make article 6 a truly universal human right one needs to reach

international consensus on how article 6 is to be understood. Such binding interpretation should regulate the legal effect of consent, in order to ensure a universal regulation of consent.

### **7.3.2 An international legally binding regulation of consent to the sale of sexual services?**

The study of CEDAW and these three countries has shown that there is a lack of systematic regulation of the legal effect of consent to the sale of sexual services. There are some examples of regulation both in international and national law regarding the sale of sexual services, but this is not systematic. International law does to some extent regulate the possibility of consenting, especially regarding trafficking for the purpose of prostitution. The national regulations share this regulation of trafficking, and to some extent regulate the legal effect of consent to other forms of prostitution.

There are many arguments in favour of a regulation of consent to the sale of sexual services. An important argument is that there is a general regulation and limitation of the possibility to consent in force already. The foregoing chapters show that all of the three countries have a regulation on the possibility of consenting. The law in force today in all three countries is that personal autonomy is not unlimited; one cannot with effect of impunity consent to all acts. The examples used for the three countries are medical experiments and bodily harm applied through assault and similar violence. In all of these cases, personal autonomy has its limits, and the line is drawn where the harm applied is too severe. The decision as to where exactly the line is to be drawn differs between the countries. In this context, it is important that all three countries have a limitation in order to protect the life and well-being of its citizens.

The next important argument is that the principles behind the general regulation of limitation on consent, also apply to the sale of sexual services. The two main principles are the severity of the act in question of consenting to and the criteria for a legally valid consent.

Firstly, prostitution is highly dangerous, the principles behind protecting individuals from severe harm thus apply here as well.<sup>345</sup> Secondly, many prostitutes conduct sale of

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<sup>345</sup> See more on the danger of prostitution in chapter 1.1.

sexual services in circumstances that would eliminate a legally valid consent in other situations, such as medical experiments or bodily harm applied through assault. The principles behind the respect for the personal autonomy, represented by consent, apply here too.

The regulation of consent to the sale of sexual services should follow the same principles as consent to other forms of bodily harm. There should be legally regulated objective criteria to the severity of the harm inflicted, drawing the line for what one can consent to. Furthermore, there should be legally regulated subjective criteria to the person consenting, regulating the legal validity of consent. There are no justifying reasons why these principles should not apply to the consent to the sale of sexual services as well.

To discuss the details of such regulation would go beyond the scope of this thesis, but interesting guidelines can be found in the international regulation of trafficking.

### **7.3.3 The distinction made between trafficking and other prostitution**

The international community already has a legal regulation limiting the personal capacity to consent to some forms of prostitution, namely prostitution through trafficking. In the Palermo Protocol, trafficking is criminalised irrespective of the trafficked person's consent where certain measures have been used. This is an objective limitation of the possibility to consent. The Palermo Protocol shows that it is not new that there are limitations on the possibility of consenting when it comes to prostitution. The Palermo Protocol only applies to trafficking, and there are differences between prostitution and trafficking. The major difference is that prostitution can be entered through many different ways, whilst two important features with trafficking are the crossing of a border and the element of deceit.<sup>346</sup> As shown above, prostitution is dangerous both for the trafficked and the non-trafficked prostitutes. It is equally important to secure the voluntariness of both groups of prostitutes. They both operate on the same market, under similar conditions. There are no justifying reasons for granting better protection to one group if they both work under relatively equal circumstances. A prostitute who has not crossed a border requires the same level of protection as a prostitute who has crossed a border.

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<sup>346</sup> See chapter 1.3 for more on the use of the term border in relation to trafficking.

These questions have been debated by the UN Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, who concluded that non-trafficked prostitution “usually satisfies the legal elements for the definition of trafficking”.<sup>347</sup> This similarity is an argument for using the Palermo Protocol as a guiding principle when adopting a legal regulation of consent to the sale of sexual services.

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<sup>347</sup> See United Nations, Commission on Human Rights, Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, UN Doc. E/CN.4/2006/62, p 9.



## 8. Conclusion

The question posed in thesis was

*What are the legal effects of consent to the sale of sexual services in CEDAW article 6 and the national regulations of prostitution in South Africa, Germany and Norway?*

The question has been answered through the chapters, focusing on separate parts of the research question. The historical overview has shown that there has been a shift in the view of consent. In the early national regulations before 1900, consent was not an issue, the focus was on preventing the spread of disease, and it was irrelevant whether prostitution was conducted voluntarily or not.

After the turn of the 20<sup>th</sup> century, one started to regulate prostitution in international treaties. In these, consenting was an issue, in different forms in the various treaties up till 1950. The regulation had explicit criteria for a legally relevant consent, where the age of the person consenting was an important factor. There were also limitations on what one could consent to, under certain circumstances and where certain measures had been used, consent was not given legal effect. This detailed regulation of consent was abandoned in the last part of the 20<sup>th</sup> century. The international treaties from this time had larger support, but a weaker regulation where consent is only indirect in focus.

The chapter regarding the international regulation has shown that the regulation of consent to the sale of sexual services in prostitution is short and not comprehensive, but detailed and thorough when it comes to trafficking. The international regulation is adopted in different treaties, and there is no coherent systematic regulation of consent to sale of sexual services.

The chapters on the three national regulations show that they are fundamentally different. In South Africa, the sale and buying of sexual services is a crime, and most of the surrounding activities are also criminalised. The question of consent is only regulated when it comes to trafficking, where the lack of consent has the effect of

impunity for the prostitute. For other prostitutes, there is no legally relevant defence that they were not consenting.

In Germany, the regulation of prostitution is strictly divided between consensual and non-consensual prostitution. Non-consensual prostitution includes direct force and other forms of exploitation and is criminalised. Third party involvement that impairs or limits the prostitute's free will in prostitution is criminalised. The presumed voluntary prostitution is tried regulated for as a profession almost like any other.

In Norway, the sale of sexual services is legal, but buying sexual services is criminalised. All surrounding activities to prostitution, such as pimping and brothel keeping are criminalised. The one-sided criminalisation is founded on the fact that prostitution is considered to be more or less involuntary; there is no genuine consent behind the act of entering prostitution.

Even though all three countries operate with differences between consensual and non-consensual prostitution, there is no comprehensive systematic regulation of the legal effect of consent to the sale of sexual services in any of the countries. This also applies to the international regulation. This thesis has shown that there is a discrepancy on international and national level in the law regulating consent to the sale of sexual services.

The answer to the research question is that there is a discrepancy in the law regulating consent to the sale of sexual services. Consent is given legal effect in some situations, but not in others. The major discrepancy lies between trafficked and non-trafficked prostitutes.

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### **3. UN documents**

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*UN CATOC* – The United Nations Convention against Transnational Organized Crime, adopted on 15.11.2000, came into force on 29.11.2003. Found at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>, pr 31.05.2011.

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## 5. International and regional judgements

### 5.1 The CEDAW Committee

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### 5.2 The European Court of Human Rights

*Dudgeon*: Dudgeon v. The United Kingdom, European Court of Human Rights 22.10.1981, (Application No.7525/76). Found at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=dudgeon&sessionid=71513328&skin=hudoc-en>, pr 31.05.2011.

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### 5.3 The International Criminal Tribunal for Rwanda

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### 5.4 The International Criminal Tribunal from the Former Yugoslavia

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## 6. Various other acts and conventions

*Belém do Pará* – The Convention of Belém do Pará, the Inter-American Organization of American States, adopted on 09.06.1994, and entered into force on 03.05.1995. Found at <http://www.oas.org/juridico/english/sigs/a-61.html>, pr 31.05.2011.

*The Swedish Criminal Act* – Swedish name Brottsbalken of 21.12.1962.

*The Swedish Prostitution Act* – Swedish name Sexköpslagen, Act 1998:408, adopted on 29.05.1998, entered into force on 01.01.1999.